In the Supreme Court of the United States

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October Term 1923.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION *Appellants* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 666
SOUTHEASTERN EXPRESS COMPANY *Appellant* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 667
SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION *Appellants* vs. AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY *Appellees*	No. 668

BRIEF FOR APPELLEE, AMERICAN RAILWAY EXPRESS COMPANY

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BRIEF FOR AMERICAN RAILWAY EXPRESS COMPANY

By stipulation, the record in each of these cases is the same except as to formal parts. The subject matter of the controversy in each case is the same. Each is an appeal from the same order or judgment. The only record which is complete within itself is that in which the Southeastern Express Company is the Appellant (No. 667). The references to the pages of the record are from the record in that case.

PART I.

STATEMENT OF THE CASE

Questions Involved

May the Interstate Commerce Commission lawfully require an express company which operates in interstate commerce by railroad, to establish and maintain through routes with a competing express carrier so as to permit shippers to require the originating carrier to be short-hauled, notwithstanding that it has a reasonable route from origin to destination or from origin to a point much nearer destination than that proposed by such through route?

The question in turn divides itself into two, to-wit:

(1) *Is the American Railway Express Company a "carrier by railroad" within the meaning of Section 15 (4) of the Act to Regulate Commerce?*

(2) *Is the order of the Commission reasonable and just which requires the American Railway Ex-*

press Company to shorthaul itself on traffic originated by it and as to which it has reasonable and adequate through lines and is rendering reasonable service from point of origin to destination, or from point of origin to transfer point much nearer destination than that fixed by the order?

Appellants must substantially assert that the Interstate Commerce Commission has "unlimited power" (R. 132) in requiring express companies to establish through routes.

Another way of stating the proposition is: An express company is entitled to the long haul on interstate shipments originated by it, so far as that can be preserved to it without causing unreasonable delay in delivery thereof to the consignees.

The case involves no controversy over rates. The rates will be the same regardless of the route over which the traffic moves. No controversy over markets is involved. There is no purpose to prefer or to shut off any market for any product, or to discriminate against any such market. No question of fact is involved. The case is based upon the facts as found by the Commission, the contention being that these facts do not justify the order of the Commission.

Organization of American Company

American Railway Express Company operated over substantially all the rail lines in the United States until May 1st, 1921, when for reasons satisfactory to the Southern Railway Company, it was excluded from the lines of the Southern Railway System. The American Company now operates over substantially all the rail lines

in the United States, except those hereinafter described, over which the Southeastern Company operates. The organization of the American Company was approved by the Interstate Commerce Commission (59 I. C. C. 459) upon the authority conferred upon it by Paragraph 7 of Section 5 of the Interstate Commerce Act as amended by Section 407 of the Transportation Act of 1920.

Organization of Southeastern Company

Southeastern Express Company began business May 1st, 1921. It was formed principally by men who were either connected with or interested in the Southern Railway System (R. 19). Southeastern Company operates over the lines of the Southern Railway System, Mobile & Ohio Railroad, and Tennessee Central Railroad, which lines lie principally in the territory south of the Ohio and Potomac Rivers and east of the Mississippi River; and it also operates over an electric line which runs from Washington to Baltimore and over a short line from Baltimore to York, Penn. These lines altogether comprise about 10,000 miles.

Order of Commission

Upon the consolidated complaints of Southeastern Express Company and Southern Fisheries Association against American Railway Express Company (in which the Appellants, Southern Traffic League and Atlanta Freight Bureau, intervened) the Interstate Commerce Commission (Commissioner Hall dissenting) passed an order July 9th, 1923, whereby American Company and Southeastern Company were ordered to establish and maintain

> "through routes between all points in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island

and Connecticut, New York, N. Y., and all points on the direct routes of the American Railway Express Company between New York and Washington, D. C., on the one hand, and all points on the main line of the Southern Railway Company from Washington to and including Birmingham, Alabama, on the other, with transfer between the American Railway Express Company and the Southeastern Express Company at Washington, D. C. * * * * * * and, that the tariffs shall provide for the right of the shipper to designate in writing the routing of shipments of express over the routes herein prescribed." (R. 43).

Effect of the Commission's Order

The American originates all the railroad express traffic in the New England States, in the City of New York, and on the direct routes from New York to Washington, and operates from Washington to Birmingham via Atlanta over the lines of the Richmond, Fredericksburg & Potomac Railroad and the Seaboard Air Line Railway, and operates over other lines leading down into the territory south of Washington.

The order of the Commission puts it in the power of shippers and of the Southeastern Express Company (through solicitation of shippers or consignees who may control the routing) to divert at Washington from the lines of the American Company to the lines of the Southeastern Company, traffic moving through Washington between the territories described in the Commission's order, although the American Company has a reasonably direct through route to destination, or without unreasonable delay or circuity of routing can deliver the traffic to the Southeastern at a junction point beyond Washington. This is what is commonly designated as "short-hauling" a carrier. For illustration, a shipment from New York to Atlanta whether it moves all the way

over the American's lines or whether it is transferred to the Southeastern at Washington, reaches Atlanta in about the same time. The distance from New York to Atlanta is about eight hundred and sixty-three (863) miles. If this shipment is transferred at Washington, the American is deprived of about 650 miles of the haul. Many similar illustrations could be made. It has been suggested that the American could be compensated for the loss of the haul in the division of the rate. But this is not practical, and moreover it is vague and uncertain as no divisions of the rates have yet been prescribed. If the American has the right to the haul, this right cannot be taken away from it and compensation be made in the form of a division of the rate.

The American has made large investments in the territory in which this traffic originates and has to bear all the expenses of collecting it, and has established adequate facilities to handle the traffic (See R. p. 6-9). The Commission found (R.23):

> "The American operates each day to and through Southeastern territory over 235 car routes for which 313 cars are used daily. No car lines operated wholly within this territory or from the border points of Washington, Louisville, Evansville and Jacksonville, to points within the territory are here included. For its use 16 special express trains are operated daily, all of which handle express destined to Southeastern territory and also 16 special trains in the reverse direction are operated from this territory to American exclusive points."

The Commission has not found that any of the routes operated by the American in the territory embraced within its order are unreasonable or circuitous. The Commission found specifically (R.19):

"On and after May 1st, 1921, the American ceased to operate over many routes that it had formerly used and in lieu thereof routes its traffic over lines over which it operates. It attempted in all instances to procure either the entire haul or the longest possible haul, and in certain instances traffic was handled over circuitous routes. Numerous complaints were received by us with respect to express shipments, and as the result of conferences between express offices and our representatives, 60 additional joint routes were established effective August 1st, 1921. Certain other joint routes in connection with express handled over the Tennessee Central Railroad were established February 9th or March 15th, 1922. This became necessary because the American ceased operations over that road on February 1st, 1922, and the Southeastern thereafter performed the express service thereon. As a result of these joint routes the express now moves between these particular points over the most direct lines. The record abounds in comparison of express schedules from which it is argued by each company that the specific route used or desired to be used is practical, and gives equal or better service than the other route or routes in question. Nothing can be gained by setting forth all these comparisons."

Contention of the American Company

The American does not contend that it has the right to hold traffic on its own lines, if thereby the delivery of the traffic is unreasonably delayed, or if its route is unreasonably circuitous; but it does contend that it has the right as to the traffic which it originates, to carry it on its own lines as long as it may do so without unreasonably delaying the delivery of the traffic at destination. Wherever it has been demonstrated that substantially better service can be afforded to the public by a joint route with the Southeastern or by delivery to the Southeastern at Washington, the American holds itself ready to establish such joint routes and to make such

delivery at Washington. The American in its bill seeking to enjoin the order of the Commission averred (R. 4):

> "Your orator is ready and willing from time to time to join in such additional through routes as may be necessary to provide delivery of the traffic to consignee without unreasonable delay."

In the conference between the American Company and the Southeastern Company, which followed the first report of the Commission and which was suggested by the Commission, the American specifically states its attitude as follows: (R. 37)

> "The American has established a large number of through joint routes with the Southeastern Express Company. It believes that the routes which have been established now give to the public, not only a reasonable express service, but in many respects, the best express service the public has ever known in the territory involved. It is, however, willing to establish additional joint routes, if any are necessary, in order to obviate unreasonable delay in the delivery to consignees. • • • •
>
> "In the establishment of any such joint routes, the originating carrier shall have the right to the long haul, so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee. The shipper shall have the right to designate in writing upon the shipment which of the established joint routes shall be used." (R. 37).

The Southeastern rejected this proposition.

This proposition and its rejection, draw the issue in this case about as specifically as it can be drawn.

Basis of the Commission's Order

The order of the Commission is predicated upon the finding that it is necessary and desirable in the public

interest, that two routes should be established via Washington, one via the American, and the other via the Southeastern; although the American which originates the traffic may have a reasonably direct through route. We quote from the opinion of the Commission (R. 32):

> "We are of the opinion and find that it is necessary and desirable in the public interest, that additional reasonable direct through routes and joint rates shall be maintained between points on the lines of the American Railway Express Comany and points on the lines of the Southeastern Express Company, regardless of the fact that one Company may have a reasonable direct single-line route or join in a reasonable direct joint route via another junction which allows it a longer haul; that the rates between any two points shall be the same regardless of the route over which the shipment may move or the number of lines over which it may travel; that joint through routes shall be established in instances where they will result in reasonable direct routes, so that there will be at least two reasonable direct routes between such points, one of which shall be via the transfer point selected by the Southeastern Express Company, and the other via the transfer point selected by the American Railway Express Company; and that the tariffs shall provide for the right of the shipper to designate the routing of express shipments over the routes established in accordance with these findings."

The finding of the Commission "that it is necessary and desirable in the public interest" that the Southeastern Express Company should be permitted to short-haul the American Company at Washington, is based upon the theory as stated in several portions of the Commission's opinion that competition will be thereby promoted between the two Express Companies, and that competition is desirable in the public interest (R. 18, 29, 30, 32).

When the Commission properly finds that it is necessary or desirable in the public interest that a route be established, the effect of the finding is to set in motion the power which has been granted to it to establish through routes. That power is to be exercised within those limitations which control the Commission in establishing such routes. One of those limitations is the prohibition contained in paragraph 15 (4) against short-hauling the originating carrier, and of course there is always the further limitation that the Commission's order should be just and reasonable under the circumstances.

The right of the shippers to route is very much more important to the Southeastern (which the Southeastern Company can avail itself of through solicitation of the shippers or consignees), than to the shippers themselves. The Commission in its opinion (R. 31, 32) finds:

> "In the vast majority of cases, shippers do not route their express. The record shows that because of the various schedules and routes the average layman is not capable of picking out the most direct route. The President of the Southern Fisheries Association testified that in his opinion about 95% of the men in the fish business could not do it. But this fact should not prevent a shipper who is capable and who desires to, from routing express over reasonably direct routes."

The Bill of Complaint

The American Company brought its bill of complaint against the United States of America (R. 1), in the United States District Court for the Northern District of Georgia to enjoin the enforcement of the order of the Commission. The contentions of the bill are that the order of the Commission is unlawful and unconstitutional: (R. 13)

First, because under Paragraph 4 of Section 15 of the Interstate Commerce Act the Commission is prohibited from requiring any *carrier by railroad* without its consent to embrace in a joint through route substantially less than the entire length of its line, unless thereby its route would be unreasonably long as compared with another practicable through route which could otherwise be established; and the American Company is a carrier by railroad within the meaning of the Act.

Second, that the order of the Commission was unreasonable and unjust:

(*a*) In that it completely ignored the rights of the American Company.

(*b*) In that the order put it in the power of the Southeastern Company by solicitation of shippers to short-haul the American Company.

(*c*) In that the order permitted shippers to route shipments without regard to the lawful rights of the American Company.

(*d*) In that the finding that the order was necessary and desirable in the public interest was based solely on the erroneous theory that as competition was desirable from the standpoint of the public the Commission therefore had the power to create competition between the two companies, although thereby one was deprived of the traffic to which it was justly entitled and which it naturally controlled.

(*e*) In that the interest of the shippers was remote and negligible and that the order was in reality not in the public interest at all, but was in the interest of the Southeastern Express Company at the sacrifice of the interest of the American Company.

Third, That the order of the Commission was contrary to the Fifth Amendment of the Constitution of the United States, in that it deprived the American of its liberty and its property without due process of law.

Intervention of the Seaboard Air Line Railway

Seaboard Air Line Railway Company intervened (R. 46) in the cause and was made a party plaintiff. Seaboard Air Line Railway Company pointed out in its intervention that it had a contract with American Railway Express Company to carry express matter over its railroad and that the Southeastern was the express agency of its competitor, Southern Railway Company; that the effect of the order of the Commission would be to divert to the line of the Southern Railway at Washington express traffic originating in the New England States and in New York City, and upon the direct routes of the American Railway Express Company between New York and Washington, which would otherwise move over the Seaboard Air Line Railway in conjunction with the Richmond, Fredericksburg & Potomac Railway; that the order would deprive the Seaboard Air Line Railway of a considerable express revenue; that the route of the American over the Seaboard Air Line Railway and its connections was a reasonable, direct route, and that the Seaboard Air Line Railway had expended considerable money in providing the equipment and facilities for carrying this traffic; and that the order of the Commission was illegal and unconstitutional for the reasons set out in the bill of the American Company.

Answer of the Interstate Commerce Commission

The Interstate Commerce Commission intervened and answered the bill (R. 92-94). This pleading is substan-

tially nothing more than a general demurrer to the bill. It asserts the right of the Commission to make the orders which it did make.

Answer of the United States

The United States entered its appearance and adopted the answer of the Interstate Commerce Commission (R. 94-95).

Intervention of the Southeastern Express Company, et al

Southeastern Express Company (R. 101), Southern Traffic League, Atlanta Freight Bureau and Southern Fisheries Association (R. 95) all intervened and were made parties defendant in the cause.

The pleadings of each of said intervenors, while somewhat argumentative and illustrative, amount to nothing more than a general demurrer to the bill.

Interlocutory Injunction

The case was heard on application for an interlocutory injunction before three judges—Hon. Nathan P. Bryan, Circuit Judge, and Hon. Robert T. Ervin and Hon. Samuel H. Sibley, District Judges—under the provisions of the Urgent Deficiency Appropriation Act, October 22nd, 1913 (38 Stat. at Large 219).

October 11th, 1923, the District Court issued its interlocutory injunction and

> "adjudged that the execution and enforcement of the order of the Interstate Commerce Commission set forth in the petition be and the same is hereby enjoined pending the further hearing of this case and until the further order of the Court; without prejudice, nevertheless, to the right of the Interstate Commerce Commission to make further in-

quiry and to establish such through routes in the territory involved, as shall be within the exceptions and provisos of Paragraph 4 of Section 15 of the Interstate Commerce Act, and not in conflict with the prohibitions of said paragraph of said section as set forth in the opinion and judgment of this Court." (R. 122).

This is the order from which the Appellants have taken their several appeals.

Judge Sibley rendered an opinion in the case (R. 122) in which Judge Ervin concurred, in which they held that an Express Company was a "carrier by railroad" within the meaning of the provisions of Section 15 (4) of the Act, and that the order of the Commission transgressed the prohibition there contained. Circuit Judge Bryan dissented (R. 128) and held that an Express Company was not a "carrier by railroad" and was not included within Section 15, paragraph 4 of the Act; that the order was not unjust and unreasonable; that the Uniform Express Contract between the American and the Railroads over which it operates provides for a pooling of freights and a division of earnings which is prohibited by paragraph 1, Section 5 of the Act, except by permission of the Commission under paragraph 2, Section 5 of the Act, and from this Judge Bryan concluded that "in establishing through routes for Express Companies and in dealing generally with them, the Interstate Commerce Commission has practically unlimited power, including that to require routings by shippers to be complied with; provided always its acts are just and reasonable and not arbitrary." (R. 132).

As we have pointed out above, the organization of the American Company has been approved by the Commission under the provisions of Paragraph 7, Section

5 of the Act. There is nothing in the opinion of the Commission in this case to indicate that the Commission disapproves the contract and the question is not even mentioned in the Commission's opinion.

On December 7, 1920, the Commission approved the grouping and division of earnings as provided for in the contract between the American Railway Express Company and the railroads (59 I. C. C. 518).

PART II.

BRIEF OF THE LAW

A Summary of the Decisions of the Commission in the Express Cases, 24 I. C. C., 381, and 28 I. C. C., 137.

These decisions make, to quite an extent, the background of this proceeding and it is well to have some analysis of them before proceeding to a more definite discussion of the issues.

The purpose of these decisions and of the orders flowing therefrom, was to establish a system which would simplify the method of ascertaining and stating rates and which would prevent circuity in transportation of express matters. It was not intended to provide a system for short-hauling any express company. Quite to the contrary, the Commission undertook to extend to express companies all the protection which the law gave to railroad companies in this respect.

These decisions were rendered respectively June 8, 1912 and July 24, 1913. Their effect, so far as they concern the present matter, may be summed up as follows:

The country was divided into zones, blocks and sub-blocks for the purpose of ascertaining and stating express rates. The zones were used in fixing only the amount of the rate, not the principles of the system. The blocks were made by the intersections of parallels of latitude and the meridians of longitude. They were numbered in a systematic way beginning at the Northwestern part of the country. There were eight hundred and thirty (830) of them (24 I. C. C. 414). The rates on long haul traffic were from block to block. A point

in each block was selected as typical. The rates from all points in the block of origin to all points in the block of destination were the same. The rates on short-haul traffic were made on the same principle, but the sub-blocks controlled. Sub-blocks were simply divisions of the main blocks. The rates from the point of origin to destination, or from one block to another, or from one sub-block to another, were the same, regardless of the route over which the traffic moved. To make an extraordinary illustration, the rate was the same on a shipment of the same kind moving from New York to Atlanta, which came by the most direct route, as on that which moved by a route so indirect as from New York to San Francisco, San Francisco to New Orleans and New Orleans to Atlanta.

This system, without more, would have destroyed itself, because it would have permitted the most indirect or circuitous of routing with the consequent delay in the handling of traffic. The Commission recognized, and undertook to cure this, making it the subject of the third division of its decision (24 I. C. C., 392), saying:

> "For the cure of this most annoying, and one of the most frequent, causes of complaint against the express companies, they should be required forthwith to establish and jointly publish through routes between the principal points in the United States, which routes shall follow the main lines of travel, the most direct in point of time measured by the schedule of those passenger trains by which normal schedules are observed. These joint through routes should be known and designated by number and should be filed with the Interstate Commerce Commission."

The Commission then gives an Illustration of how the routes should be formed and numbered (24 I. C. C. 393).

The Companies undertook to comply with this direction, but finding it burdensome, reported to the Commission to that effect (28 I. C. C., 136). On November 30, 1912, the Commission issued an order establishing a Committee to be known as "the Direct Routing Committee." The Committee was composed of a representative of each express company and of the Commission. The Commission expressed the expectation that this would minimize the evil of indirect routing (28 I. C. C., 137).

The subject is dealt with again by the Commission in the case at bar (R. 30) as follows:

> "The quoted extracts from the express case show the effort to curb circuitous routing by express companies. We first prescribed that direct routes be established. It developed that it would be too much of a burden upon the express companies to file and publish these routes in the technical tariff sense. Thereupon the express companies were relieved from so doing, but it was provided that a direct routing committee be appointed, including our representative. The duty of this committee was to study the question of routing by express companies and to provide direct routes in instances where it was found that express companies were indulging in unreasonably circuitous routing. The express companies were expected voluntarily thereafter to use the routes suggested; if not, we, after investigation, were to order what routes should be used.
>
> "The direct routing committee made no formal report, but it handled informally from day to day the questions of misrouting. No complaints against the express companies for indirect routing were made subject to the decisions in 28 I. C. C. 131.
>
> "*The tariffs showed that all routes were open, but the express companies' practice of using direct routes eliminated and closed just as effectively as if by tariff publication, all indirect or circuitous routes. If a shipment acci-*

dentally moved by a circuitous route, the rate was the same, but the shipment was improperly handled." (Italics ours).

"The Southeastern contends that since no routes were specified in the tariff all routes were open or 'established'. The American maintains that the routes decided upon by the express companies which were regularly used by them, became 'established' routes, just as if they had been specifically filed and published in a tariff and that a route was an 'established route' if it was the route used by the particular express company in question."

This contention on the part of the Southeastern Express Company brought about circuitous routing, and the Commission so holds (R. 31). When the Southeastern came into existence and offered its general concurrence, it was contending that the fact that rates were applicable over all possible routes "established" every such route. It refused to give effect to the fact that a Direct Routing Committee had been established and stood for a system which left no check upon circuitous routing, either by shipper or carrier. The American Company's limited concurrence had the effect of putting the system back to what the Commission had intended it to be, as nearly as was practicable in the circumstances.

Rule 3 of the classification, which gave the shippers the right to route by "established" routes, did not give, and was never intended to give, the shipper the right to route over all possible routes, and the Commission so holds.

The duty to establish routes, with the consequent right of the shippers to select between such established routes was left with the express companies in the manner stated, with no intent to cause any company to unnecessarily short-haul itself. The general application of the

rates permitted "in an emergency" the originating or any intermediate express company to send the shipment by some other route, but if the shipment moved out of the established route, the shipment was improperly handled, unless in case of emergency.

> "There is no more reason for a shipper to be allowed to route circuitously than there is for an express company." (R. 31).

The system which the Southeastern Express Company undertook to set up did give the shipper the opportunity for circuitous routing, and that this was used by the shipper, is shown by the Commission's decision (R. 31).

In 1912, there were no through express rates. Through shipments moved upon a combination of local rates (24 I. C. C. 411 and 413).

In establishing through routes with through rates, the Commission's decisions are to be taken with this background. There is nothing in these decisions to indicate that it was intended that the originating express carrier should be unnecessarily short-hauled. The object in establishing through routes and through rates was to prevent circuity of routing and delays incident thereto, and to make certain the applicable rate, and to make the ascertainment thereof less difficult. The Commission would not have appointed the representatives of the Express Companies on the Committee for the establishment of routes, if it was intended that the originating express company should be unnecessarily short-hauled.

So strongly did it feel on this subject, it directed that in the establishment of through routes, arrangements should be made for division of earnings, and

"that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own lines, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice. Some such arrangement is essential to the proper working of a scheme of direct through routes which will effecively stop the delays consequent upon the practice of indirect routing." (24 I. C. C. 411).

The object there was to prevent circuitous routing, and to require the originating express company to surrender its right to "the longest haul possible via its own lines," when that haul was "unreasonably long as compared with another practicable through route which could otherwise be established."

In 1921, when the Southeastern Express Company came into the field, the American Company was the only express company operating by railroad. The Southeastern having proposed a plan by its universal and unlimited concurrence with the aforementioned arrangement, which completely did away with all checks upon circuitous routing, and it having refused to recognize the existence of, or to re-establish, the Direct Routing Committee, it became necessary for the American Company to establish routes, which it did in its limited concurrence. It established through routes between only the exclusive offices of the two companies. It subsequently established additional through routes which materially short-hauled itself, in its effort to avoid unreasonable delay in the handling of traffic. (R. 19).

The American Company is ready to establish any other through routes wherever necessary, in order to

obviate unreasonable delay in delivery of traffic to the consignees, and it does not insist upon the long haul on traffic originated by it, where this will cause such unreasonable delay. It does insist upon the long haul on traffic originated by it where this can be retained without causing unreasonable delay in the delivery of the shipments.

The Commission's order in the case at bar does not depend upon its ascertainment that the American Company is violating this statement of principle, but upon the theory that this principle is wrong.

The American Railway Express Company is a "Carrier by Railroad" Within The Meaning of Section 15 (4) of The Act To Regulate Commerce

Section 15 (4) of the Act to Regulate Commerce, is here reproduced:

> "In establishing any such through route, the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice,

hearing or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

That part of the original report of the Commission dealing specifically with this subject, begins at page 20 of the record. The Commission held that:

> "It is our conclusion that the provisions of paragraph 4 of section 15 do not apply to express companies, and it is unnecessary to discuss cases cited in which the courts and this Commission have applied the law in dealing with routes established and connections required to be made between 'carriers by railroad' ".

Thus the Commission sets off express companies into a class all to themselves, just as though the Act did not apply to them unless they were specifically so named. It will develop that this would render the Act wholly inoperative as to express companies.

The question is one to be determined by the "dictionary of the Act," (R. 126) as was observed by the majority opinion of the District Court.

Express companies are well defined in the opinion of the Commission in "Express Rates, Practices, Accounts and Revenues," 28 I. C. C., 580. The apposite part of this opinion is set out in the opinion of the Commission in the present case where the Commission says:

> "We must, therefore, regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own." (R. 27).

Express companies are not by name made subject to the Act to Regulate Commerce. They became subject to the Act through the definition of the term "common carrier" which was used in the Hepburn Act (June 29, 1906). Prior to that time, express companies not owned by railroads were not subject to the Act. All common carriers are not now subject to the Act.

> "The Interstate Commerce Act does not by its terms, confer jurisdiction on the Interstate Commerce Commission over all interstate carriers or all interstate commerce or traffic."
>
> Village of Hubbard, vs. United States,
> 278 Fed., 754-755.

Section 1, paragraph 1 of the Act, contains the following:

> "The provisions of this Act shall apply to common carriers engaged in:
>
> (a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management or arrangement for a continuous carriage or shipment."

No other part of the Act is appropriate to extend the jurisdiction of the Commission over express companies. Paragraph 3 of Section 1, which was added to the Act by the Hepburn Act (June 29, 1906), contains the following:

> "The term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone and cable companies operating by wire or wireless; *express companies;* sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the

word 'carrier' is used in this Act it shall be held to mean 'common carrier' ".

These two paragraphs of the Act define the carriers which are subject to the Act.

If an Express Company is not a carrier by railroad it is not subject to the Act; if it is a carrier by airship, by water, by truck or by any other instrumentality it is not subject to the Act.

The term "carrier by railroad" by the "Dictionary of the Act," aptly includes not only a company which owns and operates a railroad, but any carrier which uses the instrumentality of a railroad to perform the carriage.

The word "by" naturally imports the means or method of performing the carriage. The use of the word "by" certainly does not require the construction that the carrier must, itself, operate the railroad which is used. The point is that the carriage is performed by that instrumentality, and it makes no difference whether the carrier operates the railroad itself or by contract procures someone else to operate the railroad for it. Regardless of who operates the railroad, when express matter is being transported over a railroad, the Express Company which makes the contracts with the shippers to carry their traffic over a railroad is a carrier by railroad, and the term aptly and technically defines the business in which the Express Company is engaged.

The phrase "carrier by railroad" does not occur in the original Interstate Commerce Act or in any of the amendments thereof until it is used in one place only in the Act of June 29th, 1906 (34 Stat. 584). The Act of June 29th, 1906 introduces for the first time transportation by pipe line, sleeping car companies and ex-

press companies. The only place in which the term "carrier by railroad" is used in the Act of June 29th, 1906 is in Section 2 amending Section 6 of the original Act to distinguish a carrier by railroad from a carrier by pipe line and a carrier by water. The Act of June 18th, 1910 (36 Stat. 539) added telegraph, telephone and cable companies (whether wire or wireless) to the carriers which were subject to the Act. Thereafter, the expression "carrier by railroad" is frequently used in the amendments and particularly in the amendment of February 28th, 1920, which made several changes in the phraseology of the Act. The original Act almost invariably employed the term "carriers subject to the Act." The amendments subsequent to the amendment of June 29th, 1906 frequently used the term "carriers by railroad" to differentiate carrier by railroad from the other kind of carriers covered by the Act. Where it was intended to include all carriers of property except those by pipe-line, by water or by telegraph, telephone or cable, then the words "carrier by railroad" were used The word "carrier" could not be used because every instrumentality covered by the Act was specifically included by the Act within the word "carrier" and for the same reason the words "common carriers subject to the Act" could not be used where it was intended to include carriers by railroad and exclude other kinds of carriers.

The amendment of February 28th, 1920, inserted the word "any" in the first line of Section 15 (4) so that it now reads:

> "(4) In establishing any such through route the Commission shall not," etc.

The amendment of February 28th, 1920 changed the words "any company" in Section 15 (4) to "any carrier by railroad" and inserted the parenthesis which now appears in this paragraph. The insertion of the word "any" before the words "such through route" emphasizes the comprehensiveness of the limitation. The words "any company" were eliminated so as to prevent the construction which the appellants now put upon the paragraph, namely, that the paragraph applies only to a railroad company which owns or operates a railroad. With the words "any carrier by railroad," which were substituted by the Act of 1920, there is no room left for the construction that Section 15 (4) was dealing only with the owner or operator of a line of railroad. The words "carrier by railroad" were also used because the parenthesis which immediately precedes makes an exception "where one of the carriers is a water line." The words in Section 15 (4) "the entire length of its railroad or any intermediate railroad operated in conjunction and under a common management or control therewith" are appropriately used when referring to an express company which is operating over or uses a railroad, and there is nothing in this particular phrase which limits the section to a railroad company which owns or operates the railroad.

No reason has been advanced why carriers of express by railroad should not be included in Section 15 (4) of the Act. The Commission in its decision in 28 I. C. C. R. 139 in speaking of express rates stated "In this respect the express service is radically different from the services performed by the railroads in the carriage of passengers and property, and is more precisely comparable with the service performed for the public by the Post

Office Department." This language is repeated in the opinion of the Commission in this case (R. 29). Considering the vast numbers of shipments by express, the infinite number of routes by which it may be carried and the fact that the routes are effected by frequent changes in passenger train schedules the reasons for prohibiting the short-hauling of express companies are even weightier than the reasons which apply to railroad companies. It would certainly derange the business of the Post Office Department if its patrons had the right to route without regard to the interest of the Post Office Department, that is of the public generally. That the express company is more like the Post Office Department than it is like a railroad in the great multiplicity of shipments it handles is the very reason why, like the Post Office Department, it should have control of the routing.

If an express company is not a carrier by railroad, it is not subject to the Act.

If the Express Company is not a carrier by railroad, the Commission's jurisdiction over it does not exist.

The phrase "carrier by railroad" is thus used in the first section of the Act to include an express company which operates over a railroad. It is so defined by legislative enactment. It must continue to have that meaning throughout the Act until the context shows that it is clearly intended by Congress that it should have another.

> "Where a statute defines the meaning of a word, it is improper to seek to give it a different meaning."
>
> Cothran & Connally v. United States,
> 276 Fed. Rep. 48.
> McCarthy vs. State,
> 175 N. W., 785.

The petition of the Southeastern Express Company before the Interstate Commerce Commission pleaded that:

> "The American Railway Express Company • • • • • • • • *is also a common carrier express company,* engaged in the transportation of property by express *wholly by railroad and partly by railroad and partly by water,* between points in the United States."

The petition took this position because it was essential that it be taken in order that the Interstate Commerce Commission should have jurisdiction over the subject matter. It was a recognition that *if the American Company is not a carrier by railroad, the Commission has no jurisdiction over the controversy involved in this case.*

The definition of the term "common carrier" and of the word "carrier" was put into the Act on the 29th day of June, 1906. The Act itself was adopted on February 4, 1887. During the nineteen years intervening between the enactment of the original Act and the Hepburn Bill, express companies not owned by railroads, were not subject to the Act. The definitions above referred to were adopted *in order that the provisions of the Act which had been applicable only to railroad companies (in so far as carriers by railroad were concerned) should be by that fact made applicable to express companies.*

The majority opinion in this case states the matter in this language:

> "In the case of the Interstate Commerce Act, Congress, by an amendment of June 29, 1906, brought pipe line carriers under the Act, by the simple declaration that 'the provisions of this Act shall apply' to them. But to bring express and sleeping car companies within it, it proceeded

to *define the term* 'carrier' otherwise than it had been construed by the Commission. The enactment was that the term 'Common carrier as used in this Act shall *include* express companies and sleeping car companies.' This was a legislative reversal of previous construction, whether by Commission, Courts or public. Effect must be given to it by making the term include those companies whenever used in the Act and its amendments. By so doing, the words of the first section must read 'common carriers including express companies and sleeping car companies engaged in the transportation of passengers or property wholly by railroad, etc.' Thereby *such* expresss companies as carry property by *railroad,* and *such* sleeping car companies as carry passengers *by railroad,* and only such, are made subject to the Act." (Italics from the opinion). (R. 124-125).

Congress did not stop in 1906, when the Hepburn Act was adopted, and make a new code for the regulation of express companies distinct from that for railroad companies, but by the change of the meaning of the words "common carrier" it placed express companies under the Act, which up to that time, had been applicable only to railroad companies (and certain water carriers) and it thereby made the provisions of the Act and its amendment, which were applicable to railroad companies, applicable to express companies, except where the context clearly made another meaning.

Prior to the Act of June 29, 1906, the term "express companies" did not appear in the Act at all. After the enactment of the Hepburn Act, the term appeared in the Act once, and that in paragraph 3 of Section 1.

Express companies are mentioned in the Act to Regulate Commerce as it now stands in only the following instances: to-wit: (1) Section 1, paragraph 3, where the term "common carrier" is defined to include ex-

press companies; (2) Section 5 (7) which empowers the Commission to authorize a consolidation of the four express companies into the American Railway Express Company; (3) Section 15 (a) which provides for the recapture of earnings of certain carriers, defines the term "carrier" to mean a carrier wholly by railroad, or partly by railroad and partly by water, *excluding* sleeping car companies and express companies. Thus express companies are there mentioned to be taken out of the expression "carrier by railroad."

From this, we will see that for the purposes of future administrative legislation as to them, express companies are now mentioned only once in the Act. It thus appears that Congress has never made a separate code for the control of express companies, but that in putting them under the Act, it made them subject to the legislation applicable to railroad companies, unless the context showed a different intent. If this be not true, there are then no administrative provisions of the Act applicable to express companies.

Discussion of the Case of Wells Fargo & Company vs. Taylor, 254 U. S., 175

This case is discussed in the majority opinion (R. 124). It does not apply, for the reason that the term "carrier by railroad" was not defined in the Employers' Liability Act, (out of which that case arose), while the term "common carrier" has been defined in the Interstate Commerce Act to include express companies; and the word "carrier" has been also there defined to mean "common carrier". The Court, in making its decision in the Taylor case, clearly had this fact in mind. We quote from the opinion at page 187 as follows:

"In our opinion the words 'common carrier by railroad,' *as used in the act,* mean one who operates a railroad as a means of carrying for the public,—that is to say, a railroad company acting as a common carrier. This view not only is in accord with the *ordinary acceptation* of the words, but is enforced by the mention of cars, engines, track, roadbed and other property pertaining to a going railroad (see Southern Pacific Co. vs. Jensen, 244 U. S. 205, 212-213); by the obvious reference in the latter part of sections 3 and 4 to statutes requiring engines and cars to be equipped with automatic couplers, standard drawbars and other appliances intended to promote the safety of railroad empoyees (see San Antonio & Aransas Pass Ry. Co. vs. Wagner, 241 U. S., 476, 484); by the use of similar words in closely related acts which apply only to carriers operating railroads, c. 196, 27 Stat. 531; c. 225, 35 Stat. 476; c. 208, 36 Stat. 350, and by the fact that similar words in the original Interstate Commerce Act had been construed as including carriers operating railroads but not express companies doing business as here shown 1 I. C. C. 349; United States vs. Morsman, 42 Fed. Rep. 448; Southern Indiana Express Co. vs. United States Express Co., 88 Fed. Rep. 659, 662; s. c. 92 Fed. Rep. 1022. And see American Express Co. v. United States, 212 U. S. 522, 531, 534." (Italics ours).

Attention is called to the fact that the court restricted its definition of this phrase to its meaning "as used in the Act." The Act there under construction was the Federal Employers' Liability Act of 1908, and not the Interstate Commerce Act.

The Court also called attention to the fact that similar words in the original Interstate Commerce Act had been so construed as not to include the kind of express companies which were being then dealt with. The Court dealt with the fact that this phrase had been so construed in the *original Act,* with the knowledge, of course, that the Act had been amended many times since then,

and in limiting the construction of the word to that as used in the "*original* Interstate Commerce Act", the Court manifestly meant to call attention to the fact that it did not refer to the meaning of this phrase in the Act as amended.

The Court then calls attention to the fact that this phrase in its "ordinary acceptation" does not include express companies. In mentioning its "ordinary acceptation," there is a clear implication that the same phrase might very well have another acceptation.

In the original Act, jurisdiction was given over common carriers wholly by railroad and partly by railroad and partly by water. This was held insufficient to include express companies, because of the "ordinary acceptation" of the expression. In 1906, this "ordinary acceptation" was changed by legislative definition, by which the words "common carrier" as used in the Act, were declared to include express companies.

Here then, is the legislative Act which changed the meaning of this phrase from its "*ordinary acceptation*" so as to make the same include express companies. The Court, in referring to the use of similar words in the original Act, had knowledge of their use in the amended Act, which gave to it the special legislative meaning just referred to. It is reasonable to presume that the Court in the Taylor case restricted its definition of the phrase to its use in the Federal Employers' Liability Act, because of its knowledge that the original Interstate Commerce Act had been amended and that in the amendment, the phrase had been given a legislative definition. The change "was a legislative reversal of previous construction, whether by Commission, courts or public." (R. 124-125).

Mention in the Employers' Liability Act of cars, engines, track, roadbed and other property pertaining to a going railroad, and reference to the statutes requiring the engines and cars to be equipped with automatic couplers, etc., were deemed by the court to be important aids in ascertaining the meaning of the phrase as there used. The court then refers to the use of the same words in other statutes and to the construction of similar words in the original Interstate Commerce Act.

The words "carrier by railroad" were imported into Section 15 (4) of the Act by the amendment of February 28, 1920. The Court of Appeals for the Fifth Circuit decided the Taylor case, February 28, 1918, (249 Fed., 109), holding that the phrase "common carrier by railroad" as used in the Federal Employers' Liability Act did include express companies. So that when Congress used this expression in the Amendment of 1920 to the Interstate Commerce Act, there was an authoritative decision that, even in the Federal Employers' Liability Act, the phrase included an express company. The Supreme Court did not reverse the decision of the Court of Appeals until December 6, 1920, or nearly ten months after Congress had adopted its amendment of February 28, 1920.

This Court, in deciding the Wells-Fargo case, was dealing with the Act which regulated the relation of master and servant in the operation of railroads in interstate commerce. The relation of master and servant did not exist as between the express company and the employees of the railroad company which was operating the railroad, and, as pointed out by the Supreme Court in this case, the employees of the express company on the trains of the railroad company were not employees of the

railroad, but were exclusive employees of the express company and the negligence at which the Employers' Liability Act aimed, was negligence in the operation of the railroad, or in the track, roadbed and equipment of the railroad, things which were peculiarly within the scope of a railroad corporation.

A Consideration of the Context in Connection with Which the Expression "Carrier by Railroad" Was Used in Section 15 (4)

The majority opinion in the case at bar did not find it necessary to resort to the context, saying:

> "The case, indeed, is not one of ordinary construction, in which the reasonable intent of Congress is to be gathered from the context, but is rather one of executing a postive legislative mandate, defining terms." (R. 126).

We think that this statement is entirely correct and that it should control; but if it be not correct, the same result should be reached by a consideration of the context. Of course, context is one of the most powerful elements in the construction of a statute. Genert vs. Limbach, 50 Sou. 903, 904.

In the part of the Act now under consideration, the context is entirely different from that of the Federal Employers' Liability Act, and there is an absence of the expression, "cars, engines," etc. The decision of the Interstate Commerce Commission in the Express Case, 1 I. C. C., 349, holding that an express company was not within the meaning of the Act, dealt with the Act as it then stood, which was of course long prior to the legislative definition given to the terms "common carrier" and "carrier," by the Hepburn Act of June 29, 1906. The

legislative definition of 1906 given to the words had for its purpose the changing of conditions in reference to express companies as they had existed prior to that time.

Paragraph 3 of Section 15 authorized the Commission to establish through routes, joint classification and joint rates, fares or charges applicable to the transportation of passengers or property. The Commission correctly holds that this power "includes express traffic."

Thus, we start with the context which confessedly includes express companies. We are dealing with a rule which "applies to parcels as to car-loads" (24 I. C. C., 387).

The next paragraph prohibits the Commission, with certain exceptions, from requiring any carrier by railroad, without its consent, to short-haul itself. Following this, there is a proviso that in time of shortage of equipment, congestion of traffic or other emergency declared by the Commission, it may establish temporarily such through routes as in its opinion are necessary or desirable in the public interest. Of course this latter provision should apply to express companies, for in case of emergency, the public interest might well need this extraordinary power, as well for express as for ordinary freight transportation.

Express companies were imported into the Act to Regulate Commerce June 29, 1906. They were an agency by which numbers of railroads are combined into one instrument of transportation. Therefore, when they came under the Act and performed transportation by railroad, they necessarily became carriers by railroad, and this idea is the basis for the Commission's holding that they are "arms of the railroad."

We thus find that in the third paragraph of Section 15, which gives the Commission power to order through routes, the language includes both freight and express. We then find that in the proviso to paragraph 4, the emergency provision applies to express as well as to freight. The argument then is that the first part of paragraph 4, which is sandwiched between the two provisions just referred to, should be given a meaning narrower than is confessedly given to that part of the Section which precedes it, and as well, to that part which follows it. Of course, paragraphs 3 and 4 of Section 15 are to be construed together. The majority opinion so states (R. 126).

Another and important part of the context in which this phrase is used in this part of the Act, is to be found in the first paragraph of Section 6, as follows:

> "That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route *of any other carrier by railroad*, by pipe line or by water when a through route and joint rate have been established." (Italics ours).

This paragraph of Section Six (6) was amended into its present form by the Hepburn Act (June 29, 1906), which (Sec. 1, par. 3) changed the meaning of "common carrier" to include express companies and of the word "carrier" to mean "common carrier."

There can be no lawful rate for interstate carriage which is not published in the manner provided by the Act. That part of the Act which deals with the duty of

publishing a through rate is of course to be construed especially in connection with the other part (Section 15 (4), which deals with the circumstances under which through routes may be ordered.

If the expression "carrier by railroad" as there used does not include an express company, then there is no obligation on the part of the express company to publish rates on a through route with any other express company.

If we attribute to the phrase "carrier by railroad" as there used, a meaning broad enough to include express companies, this provision of the Act will be sufficient to require publication of through rates by all carriers of property, including pipe-lines.

If this expression as there used is not sufficient to include express companies, then there is no requirement for the publication of through rates by one express company with another express company. If such rates be not filed and published as required by the Act, there can be no joint routes. Clearly, Congress meant in this connection to require publication of such rates by railroad companies, express companies, carriers by pipe-line and carriers by water. It there used the expression "carrier by railroad" to include railroad companies and express companies. It used the expression "carrier by pipe-line or by water" to include the other carriers of property. The expression "carrier by railroad" and "carrier by pipe-line or by water" were intended to include all carriers of property which are subject to the Act.

If we do not attribute to Congress the intent to include express companies in the expression "carrier by railroad" as here used, we are forced to attribute to it an intent to *exclude* express companies from this provision.

The majority opinion (R. 125) deals with great clearness, with this Section as follows:

> "In this same Act, in its amendment of Sec. 6, is, so far as we can find, the first used (use) by Congress of the short expression 'Carriers by railroad'. It occurs in the requirement that 'Carriers subject to the Act—all of them —shall file and publish their rates from points on their own lines to those on the lines of "*other carriers by railroad, by water, or by pipe-line.*" ' Very plainly all the carriers subject to the Act are intended to be included in this threefold classification and 'Carriers by railroad' includes not only railroad companies, but express and sleeping car companies which use railroads in carriage. It was a short equivalent for the language of Section 1, 'Common carriers engaged in the transportation of passengers or property by railroad' and included what that included." (Italics from record).

The minority opinion takes no issue with this construction of Section 6 of the Act (R. 130). The Commission has substantially construed this Section in accordance with the opinion of the Court. *Cultra vs. Western Union Telegraph Co., 44 I. C. C., 670.*

Thus, we see that Section 6 makes a part of the context in which Section 15 is to be construed; for one section deals with joint routes and the other with joint rates applicable over them. In this part of the context, the Commission holds that the phrase "carrier by railroad" includes express companies. The phrase should of course have the same meaning when dealing with the reward as when it fixes the duty.

There are two rules to apply in construing the phrase "carrier by railroad" as used in Section 15 (4). One is "the dictionary of the Act." The other is the context in which the phrase is used. If the "dictionary of the

Act" applies, it controls. If it does not apply, the context controls. The definition contained in the "dictionary of the Act" forces the inclusion of express companies; but if this were not so, the context in which the phrase is used is itself so very strong that it leaves no other rational meaning.

The Commission has itself recognized that the definition of this very phrase, appearing in the first section of the Act, controls.

In 1 I. C. C., 677-682, the Commission says:

> "Therefore, the definition of the first section controls the application of the law by stating what carriers are within its terms, and the implication at once arises that common carriers exist which are not subject to the provisions of the Act."

The first section of the Act is there treated as defining the carriers which were then subject to the Act, and that definition was made to extend throughout the Act.

Our contention is in exact accord with the principle there stated by the Commission, which is that the definition contained in the first section of the Act as to what carriers are subject to the Act, should now control. Our further contention is that the definition contained in the first section of the Act was changed by the Hepburn Act of June 29, 1906, by which change the definition was broadened to include express companies. Of course, the Commission does not contend that the definition was not so broadened. The basis of the Commission's right to assert any power in the premises is the fact that the definition was broadened to include express companies.

It was not intended even by the amendment of 1906 to bring all express companies under the Act. Express

companies which carry only by truck or wagon, or which carry solely by water, or by water and truck, are not subject to the Act. It is only those express companies which carry wholly by railroad or partly by railroad and partly by water, which are subject to the Act.

There is no such means of carriage as carriage by express. There is carriage by railroad, by water, by highway and by air.

> " 'Carrier by railroad' is an abbreviation evolved from the words of Section 1 of the original Interstate Commerce Act: 'Common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water.' " (R. 124).

In paragraph 6 of Section 15, the Commission is given jurisdiction over divisions of joint express and other rates and it is required in prescribing such divisions to "give due consideration among other things to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes and a fair return on their *railway property* held for and used in the service of transportation," etc.

Of course there must be a fair return on the railway property held for and used in the service of express transportation, just as there must be a fair return on the railway property held for and used in the service of mail transportation. The power to establish through routes is connected with the power to divide the reward arising therefrom. In requiring the consideration of the value of railway property in this connection, there is no exception as to express companies.

All parts of the act which relate to through routes cannot be made applicable to express companies, if the

restricted meaning attributed by the Commission is to be applied to the expression "carrier by railroad." All of these parts of the Act can be used, if the phrase is given the meaning contended for by the American Company.

The decision of the Interstate Commerce Commission in the matter of express rates, practices, accounts and revenues (24 I. C. C., R. 381) shows clearly that the Commission then regarded Express Companies as "carriers by railroad" and applied the same rules to them.

This case was decided in 1912.

On page 387 the Commission says:

> "The Act to Regulate Commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The Act also by name recognizes the Express Company as a carrier subject to our jurisdiction. We must, therefore, regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business, to which these agencies have added a service that is distinctive and peculiarly their own."

On page 389 the Commission says:

> "We have treated the express company as an agency of the railroad, furnishing passenger train movement for small packages of freight, extending its service to the door for the gathering of the package at the point of origin, giving special care to the shipment during transportation, and again extending its service by wagon to the door at point of destination."

On page 418 and page 419 the Commission speaking of the value of express property as a rate basis says:

"A reasonable express rate may not be fixed upon the basis of the value of the property owned and used by the Express Company * * * An express company is, in contemplation of the decisions of the Supreme Court in the Express cases, an agency of the railroad for doing small parcel business * * * * It has no right to impose unreasonable rates by reason of the exclusive contract which it enjoys with the railroad. It must be treated as the railroad itself would be treated. It is an arm of the railroad; it is the railroad itself reaching out to the door and taking the package and delivering it again personally to the consignee. * * * * It is the railroad property which gives the greater part of the service upon which a reasonable return should be allowed, and not the Express Company, the value of whose property is comparatively insignificant."

And again on page 431 the Commission speaking of the standard of rates, says:

"It is proper for the Government to treat the Express Company as a freight forwarder by passenger train, giving supplemental service at each terminus and intermediate care."

If the phrase is construed as the American contends, it will keep the law in line with the decisions of the Commissions and Courts. Any other construction must put express companies into a class by themselves, and apply to them theories which have always been thought to be both unjust and unreasonable.

Some of the Authority which the Commission Surrenders if it Holds That the Term "Carrier by Railroad" does not Include Express Companies

(1). It must lose jurisdiction over express companies themselves, for, under Section 1, the provisions of the Act apply only to common carriers engaged in the trans-

portation of passengers or property, wholly by railroad, or partly by railroad and partly by water. In other words, the express company must be a common carrier either wholly or partly by railroad, before it is subject to the Act.

(2). Such ruling will deprive the Commission of the power to give directions in reference to the handling and routing, and the movement of traffic by an express company, when that company is, in the opinion of the Commission, unable to properly serve the public.

(3). It will relieve the express company of the duty of filing rates between points on its own routes and points on the routes of any other express company.

(4). It will take express companies out of the provisions of the Elkins Act, in so far as that Act relates to the failure of filing and publishing tariffs as to through express rates.

(5). It will deprive the Commission of power to regulate extension of credits by express companies.

(6). It will deprive the Commission of power to require express companies to keep the names of their agents posted.

These statements are not intended to be inclusive of all the powers the Commission will lose by this construction.

It is Fundamental in the American Law of Common Carriers That the Originating Carrier Should not be Short-Hauled

The originating carrier should not be required to short-haul itself, except in most extraordinary circumstances.

It has been recognized time and again by the Commission that the originating carrier is entitled to the long haul. ***There is probably no exception to this rule except that made in the order now under consideration.*** **Some of the expressions of the Commission on this subject are as follows:**

> "The law upholds a carrier in retaining tonnage to its line where the transportation can be performed upon equal terms, with reasonable dispatch and without undue discrimination."
>
> Suffern Grain Co. vs. I. C. R. R., 27 I. C. C., 192.

> "The long haul is generally conceded to the originating line."
>
> Salt rates from Wisconsin to Iowa,
> 27 I. C. C., 526-529.

In through passenger routes (16 I. C. C. 311) the Chairman (Knapp) said:

> "In the absence of a *real public necessity*, it seems plainly equitable, by compelling connections and through routing, to take from a carrier traffic for the accommodation of which it has expended millions of dollars and practically turn over that traffic, with the use of the carrier's terminals, to a competitor which does not see fit to provide for itself the needful railway and terminals."

This position was substantially adopted by the Court in I. C. C. vs. D. L. & W. Railroad, 216 U. S. 531-537, where it is said:

> "The object of the statute was not to give a roving commission to every road that might see fit to make a descent upon a main line."
>
> "The law contemplates protecting a carrier in its long haul on the traffic which it originates."
>
> Commercial Club of Superior, Wisc. vs. Great Northern Ry. Co., 24 I. C. C., 96-113.

"The Commission ordinarily will not lend its aid to an effort by one carrier to secure traffic that is reasonably tributory to another line by compelling the latter to join with it in through routes and rates."

Cin. & Col. T. Co. vs. B. & O. S. W. R. R. Co., 20 I. C. C., 486.

In the same case, the Commission says:

"As the section now reads, the only limitations on our authority to establish through routes and joint rates that need be mentioned here are (a) We may not require any railroad involuntarily to embrace in a through route substantially less than the entire length of the road between the termini of the proposed through route. (b) We may not establish through routes and joint rates between a steam railroad and a street electric passenger railway that does not transport freight in addition to its passenger and express business. *The first of these limitations must, of course, be observed in all cases; the second has no application in connection with this complaint.*"

"Originating lines, generally, are entitled to the longest haul they can perform where the transportation can be performed upon equal terms, with reasonable dispatch and without undue discrimination."

The Columbia Gold Mining Co. vs. Ore-Wash. R. R. & Navigating Co., 35 I. C. C., 42-43.

"That the law upholds the carrier in retaining tonnage on its line where the transportation can be perfomed with reasonable dispatch and without undue discrimination, is well settled. See Suffern Grain Co. vs. I. C. R. R., 27 I. C. C., 192-194; Wheeler Lumber, Bridge & Supply Co. vs. A. T. & S. F. Ry. Co., 30 I. C. C., 343-344. It is also settled that our authority under section 15 of the act to establish in the first instance, or to continue in force voluntarily established through routes and joint rates, is limited to the extent that we may not require a carrier, without its consent, to embrace in such through route substantially less than the entire length of its railroad between the termini of the through route, unless to do so would make such through

route unreasonably long as compared with another practicable through route which could otherwise be established. Marble Rates from Vermont Points, 29 I. C. C., 607-608.

The Ogden Gateway case, 35 I. C. C., 131."

45 I. C. C., 227.

"The statute provides that in establishing joint rates and through routes, each carrier against which the order is made shall be given the benefit of the long haul by its own line 'unless to do so would make such through route unreasonably long as compared with another practicable route which could otherwise be established.' We cannot, therefore, establish in every case a through route and a joint rate, but must work under the limitation imposed by the Act of Congress as above set forth."

Investigation of Alleged Unreasonable Rates and Practices on Meat, 23 I. C. C., 656-662.

"If a railroad has traffic in its possession, it should be allowed to handle it by its own line, as far as it can, unless the public will suffer thereby."

Waverly Oil Works vs. Penna. Railroad Co., 28 I. C. C., 621-630.

The Commission in its report in this case (R. 20) holds that paragraph four of section fifteen (15) of the Act does not apply to Express Companies.

The Commission arrived at this conclusion by putting express companies into a class all to themselves. Let us see how ill this fits into the Commission's former decisions in 24 and 28 I. C. C. There it was said that "the Act to Regulate Commerce now imposes upon all the railroad carriers the obligation to make through routes and to furnish proper facilities for transportation of freight. This rule applies to parcels as to carloads." In other words it is there declared that the law applicable to railroad carriers as to through routes applies to parcels as well as to car-loads. That is, it

applies to express companies as well as to railroads. The Commission also there declared:

> "We must therefore regard these great forwarding companies as agencies created by the railroads and recognized by law for the conduct of a certain kind of freight business to which these agencies have added a service that is distinctive and peculiarly their own."
>
> 24 I. C. C., 387.

The Commission then said that the express company "*must be treated as a railroad itself would be treated. It is an arm of the railroad; it is the railroad itself reaching out to the door and taking the package and delivering it again personally to the consignee.*" 24 I. C. C., 419. If the express company is to be "*treated as the railroad itself would be treated,*" then it should not be required to unnecessarily short-haul itself.

That there is a natural justice in permitting the originating carrier which initiates shipments to carry them forward and to have the revenue therefrom, is again recognized by the Commission in Dakota Junctions, 81 I. C. C., 275; Western Mines, 66 I. C. C., 108.

Other cases recently decided by the Interstate Commerce Commission making like expressions, are:

> Transit on Lumber & Forest Products in Carloads in Washington, Idaho & Montana, 83 I. C. C., 451, 458.

from which we quote:

> "Within certain exceptions, a carrier may properly insist, as to traffic which it originates, upon including in a through route so much of its line as lies between the points of origin and destination, provided such route is not unreasonably long."

and

Simms Oil Co. vs. Houston & Texas Central R. R. Co., 85 I. C. C., 537, 538-9.

The Court below, in dealing with this part of the subject, said (R. 126):

> "Leaving discussion of words, we are confirmed in this interpretation by considering the possible reasons which may have moved this enactment. The main purpose was, in substitution for the original prohibition against establishing another through route when one was already in existence, to extend protection to initial carrriers by railroad against being compelled unnecessarily to 'short-haul themselves.' Reasons which occur to us as perhaps moving thereto are: (1) The natural justice in permitting one who initiates a thing to carry it forward and reap its benefits as far as possible. This has been recognized by the Commission in Dakota Junctions, 81 I. C. C., 275, Western Mines, 66 I. C. C., 108, and by this court in American Railway Express Company, v. Railroad Commission of Georgia, 274 Fed. 649. This reason would apply as strongly to an express company as to a railroad company. (2) The amendment of 1906 had imposed on the initial carrier responsibility for the whole carriage. It would seem right that it carry and control the shipment as far as possible—a reason applying with equal force to railroad and express companies. (3) The uncertainty, delay and risk of loss and damage incident to unnecessary transfers would apply equally to freight and express. (4) The investment of the carrier on which it must make a return may differ in degree as between railroad and express companies, but not in substance."

The opinion of the Court is not only in line with what it terms the "natural justice" of the situation, but it is in line with the previous rulings of the courts and of the Commission.

A carrier should be allowed to use the facilities which it is required to keep and furnish. (A. T. & S. F. Ry. Co. vs. United States, 232 U. S., 199).

The American Company is compelled to keep its plant and organization and facilities at tremendous expense; it should be allowed to use them, unless this use contravenes some well established prohibition of the law.

The Power of the Originating Carrier to Retain Traffic for the Long Haul is a Property Right

The authorities quoted in the preceding section of this brief are themselves sufficient to sustain the statement that the power of the originating carrier to retain traffic for the long haul is a property right. It is not contended that this may be exercised to the extent that traffic is unreasonably delayed nor that in its exercise a route may be established which is unreasonably long as compared with another practicable through route which could otherwise be established.

The Commission has recognized that the originating express carrier has this right, for in its report in 24 I. C. C., 411, it states:

> "We have said to these carriers in connection with the discussion of the establishment of through routes and rates that in their arrangements for the division of earnings, due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest haul possible via its own lines, and that division shall be agreed upon which shall compensate the originating carrier for its sacrifice."

We have pointed out that the Commission has found in the matter of Through Passenger Routes, 16 I. C. C., 309, that this right as to both passenger and freight business is a thing of value to the railway which should be protected, in so far as it can be done without in-

fringing upon the rights of the public. In considering this last case in 216 U. S., 538, the court thought that "the personal preferences" do not make a sufficient basis for depriving the carrier of its long haul. The Court further said that "the condition in the statute is not to be trifled away." That is, the conditions in the statute for the protection of the originating carrier would be carefully guarded.

The same thought is expressed in Kentucky & Indiana Bridge Co. vs. L. & N. R. R. Co., 37 Fed., 567, 633. We are not dealing in the case at bar with a mere administrative order. It is purposed to take the property of a carrier. The originating carrier is to be required to provide facilities and equipment and to utilize those facilities and equipment in a specified manner, necessarily with a great loss of revenue. The order is, on principle, very much like that complained of in State of Washington vs. Fairchild, 224 U. S., 510, where the court said:

> "An order of a railroad commission requiring a railroad company to expend money and use its property in a specified manner is not a mere administrative order, but is a taking of property; to be valid there must be more than mere notice and opportunity to be heard; the order itself must be justified by public necessity and not unreasonable or arbitrary."

In that case, the question was the establishment of certain side tracks and the Court held that the order of the Commission was not merely administrative, but was a taking of property.

The bill in this case recites the great amount of property involved in the making and maintaining of the American Company's organization, the large amount of

real estate and equipment, and the thousands of men and women who are employed and who must be paid to render this service, and who, scattered throughout the country, work in coordination and make the organization of this Company. In addition to this, there are the many trains, cars and engines, together with the roadbed and terminals and terminal facilities which are afforded by the railroads in conducting this business. The power which it is sought to exercise in this instance must have been either clearly conferred or it does not exist. If the power exists, it must be exercised within the limitations of the statutes, and reasonably and not arbitrarily.

The Development of the Law as to the Establishment of through Routes and the Shipper's Right to Route

(1). The control of the carrier's business rests in the first instance with it. The power of the carrier over its business, as it was at common law, remains unimpaired except as it has been altered by the Interstate Commerce laws.

United States v. I. C. R. R., 44 S. C. R., 189.
I. C. C. vs. B. & O. R. R., 43 Fed., 37-56;
I. C. C. vs. Chicago Great Western R. R., 209 U. S. 109, 119;
Southern Pacific Co. vs. I. C. C., 200 U. S., 536, 554.

(2). At common law, a carrier could not be required to issue through bills of lading or to establish through routes. This proposition is established beyond dispute.

Southern Pacific Co. vs. I. C. C., 200 U. S., 536;
A. T. & S. F. R. R. Co. vs. D. & N. O. R. R. Co., 110 U. S., 667, 680.

(3). Under the original act adopted February 4, 1887, there was no power vested in the Commission to require the making of through routes. See authorities above cited.

(4). The first amendment to the Act which undertook to give power to the Commission, after hearing, to establish joint rates and through routes, is the Hepburn Act of June 29, 1906. The Commission was there given the power, after hearing on complaint, to establish through routes and joint rates as the maximum to be charged, and to prescribe the division of such rates and the terms and conditions under which such through routes should be operated, "provided no reasonable or satisfactory through route exists."

It was held by this court in I. C. C., vs. D. L. & W. R. R. Co., 216 U. S., 531, that this proviso was jurisdictional.

(5). The next development was the Act of June 18, 1910, which substantially re-enacted the Act of 1906, leaving off the provision as to the existence of satisfactory through routes. It was, however, provided that:

> "In establishing such through route, the commission shall not require any company, without its consent to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." (Sec. 15 (D), 24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552).

Paragraph (E) of Section 15 of the Act of 1910, gave the shipper the right to route in this language:

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided, to which through routes and through rates such a carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination", etc.

The effect of the Act of 1910, besides giving the Commission the power to act upon its own initiative, and making somewhat more obligatory its duties in the premises, eliminated the proviso above referred to, which made its jurisdiction depend upon the fact that no reasonable or satisfactory through route was then in existence. It provided, however, that the Commission should not require any carrier, without its consent, to embrace in such through route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless to do so will make such through route unreasonably long as compared with another practicable through route which could otherwise be established.

This provision is now as much a part of the jurisdictional essentials of the exercise of the Commission's power as was the previous requirement as to the existence of a reasonable or satisfactory through route.

(6). The next change was that brought about by the Act of February 28, 1920, which amended paragraphs

3 and 4 of Section 15 of the Act, to read as they now stand, as follows:

"(3) The Commission may, and it shall, whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and the division of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water.

"(4) In establishing any such through route, the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line, require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could other-

wise be established; Provided, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Thus we see that the development of the law has been, not in sudden changes, but beginning with 1887, when there was no power in the Commission over the subject, to the Act of 1906, which gave a limited power to the Commission, to the Act of 1910, which also gave a limited power to the Commission, and then to the Act of 1920, which likewise gave a limited power to the Commission, the development of the law has been always in keeping with the proposition that the originating carrier should not be unnecessarily short-hauled, and that the right of the originating carrier to carry to destination, when that could be done with reasonable service to the public, is a property right, and that changes which would bring about alterations in this property right, should be accompanied by proper safe-guards, and its operations limited by proper restrictions. This is in keeping with the opinion of the Court of Appeals for the Fifth Circuit, in the case of Gulf, Colorado & Santa Fe Railroad Co. vs. Miami Steamship Co., 86 Fed., 419, where it is said:

"Such a scheme for establishing compulsory through rates should be surrounded by proper safeguards and its operation limited by proper restrictions."

The Commission apparently contends for an "unlimited power" over this subject matter, and the South-

eastern Express Company contends that the Commission should have unlimited power to take the business of the American Company and give it to the Southeastern.

The line of demarkation between the contending forces in this case is that the American contends that the power of the Commission is limited by statutory and definite restrictions, and as well, by the restriction that all of its acts must be reasonable and just. The appellants contend that the power of the Commission is an "unlimited power." Just as this is the demarkation between the contentions of the parties, so it is the demarkation between the majority and minority opinion. The majority opinion, as we have seen, holds that the power of the Commission over the subject is accompanied by limitations. The minority opinion holds that:

> "In establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission has practically unlimited power, including that to require routings by shippers to be compiled with; provided always its acts are just and reasonable, and not arbitrary." (R. 132).

Thus, the minority opinion, agreeing with the appellants, undertakes to confirm into the Commission unlimited power over a subject with which Congress and the courts have always dealt as one to be treated under proper safe-guards.

Manifestly, this radical departure from precedent and from the natural justice of the situation, should not be sanctioned except upon the clearest statutory direction supported by constitutional grant.

The Commission did not believe the shipper's right to route was in the public interest at the time the Commerce Act of 1920 was on its passage.

See

Clark on Interstate Commerce, 30-31.
(Published by John Byrne & Co.)

Discussion of the Decision in the Case of the American Railway Express Company vs. Railroad Commission of Georgia, 274 Federal, 649

This decision was rendered by the United States District Court for the Northern District of Georgia (three judges sitting,—Circuit Judge King, and District Judges Evans and Sibley). It involved an order of the Georgia Commission to very much the same purpose as is the order now under consideration, except, of course, the one was confined to intrastate commerce in Georgia, and the other to interstate commerce. The Court in that case declared that

> "It never was intended to permit one carrier to short-haul another in the interest of its own business, unless a most decided case of promotion of the public service demanded it."

The Court made this utterance in construing the power of the Georgia Commission to fix "just and reasonable joint rates." It held the Georgia Commission's order void. It did not undertake to enjoin the Commission from establishing through routes and joint rates upon reasonable and just principles. It left the Commission unaffected in its power to designate through routes and to fix rates applicable thereto, when those routes were designated and when they were made in accordance with the principles announced in the decision. The Court states:

> "Where a carrier is furnishing reasonable facilities to the public, it cannot be required to open its exclusive bus-

iness facilities to a competitor, or to enter into joint arrangements with it to promote its business. We therefore think that in this case, if the Commission establishes joint rates between these carriers, it should designate the routes over which such rates are to apply and the division thereof *in the light of the above principles.*"

The Commission in the report now under consideration, holds that

> "Under section 15 (3) we have not only the power to require through routes and joint rates, but also to prescribe the 'terms and conditions under which such through routes shall be operated'; and *under this power we may provide for the right of the shipper to route.*" (R. 31).

The Commission thus necessarily holds that the shipper has no right to route express shipments, but that the Commission itself may empower the shipper of express to select between established routes. At most, this power is a discretionary one in the Commission.

The discretion of a body created by law is a legal discretion and not an arbitrary one. It is to be exercised reasonably and justly; it is not to be exercised in doing that which is unreasonable and unjust. (See Nashville Grain Exchange vs. United States, 191 Federal, 37).

Congress thought that it was unjust and unreasonable to require a carrier by railroad, without its consent, to embrace in a through route substantially less than the entire length of its line, unless to do so would make the through route unreasonably long.

Express shipments have always been referred to as a species of freights. (See in Re Express Companies, 1 I. C. R., 677). This opinion starts off with the statement:

"A considerable part of the movement of freight from one state or territory to another throughout the United States is carried on by so called 'express companies' ". (See like references in 24 I. C. C., 389, 424, 426).

No one questions the right of the Commission to establish through routes within the limitations provided by the Act, and which are just and reasonable. We say that it is both out of the specific limitations of the Act and also unjust and unreasonable and therefore, on that account, outside of the scope of the Act for the Commission to establish a route for the purpose of depriving the American of its long haul. Such a route is certainly not necessary and we are quite convinced that it is not desirable in the public interest. That the Southeastern may desire it, or that some few shippers may desire it, does not make it desirable in the public interest in the sense in which that term is used in the Act. Certainly, it was not intended that the power of the Commission could be set in motion simply to satisfy the whim of a shipper, but if we are wrong in this, the power once set in motion, must be kept within the limitations of the Act.

We must remember that we are "dealing with an administrative order that seriously affects property rights and does so by way rather of fiat than of adjudication," (I. C. C. vs. Northern Pacific Railway, 216 U. S., 544) and that such taking of property must be "justified by public necessity and not unreasonable or arbitrary." (State of Washington vs. Fairchild, 224 U. S., 510).

A bare personal preference does not make the route "desirable" within the meaning of this Section of the Act (I. C. C. vs. Northern Pacific Railway, 216 U. S., 544).

Of course a route which is "desirable" within the meaning of this Section must be one which can be established within the limitations upon the power of the Commission. The desire which will set in motion the power of the Commission must be of that kind which can be satisfied within the limitations on the power which is set in motion.

Who Are to be Considered in Determining Whether the Order of the Commission is Reasonable

At least three classes of persons are to be considered in determining whether or not this order is reasonable. They are: (1) The Carrier; (2) The General Body of Shippers; (3) The Specific Shipper.

If the order is unreasonable as to any one of these classes, it is unreasonable. The order would require the American Company to short-haul itself on a shipment from New York to Birmingham, to the extent of allowing it, the originating carrier, a haul of two hundred and twenty-six (226) miles against the haul of the Southeastern, connecting carrier, of about eight hundred (800) miles, when the shipment would be delivered to the consignee at substantially the same time as it would be delivered if carried all the way by the originating carrier, the American Company.

The Commission in its 23rd Annual Report, (1909) p. 7, stated that:

> "Ordinarily it is immaterial to a shipper by what route his traffic moves if it reaches its destination in due time, upon a proper rate, and with the desired delivery".

The rates are not in question (R. 29). It is not to the interest of the general body of shippers that the

American Railway Express Company's organization be broken down, nor that its business be pirated upon when, after all, the result is to accomplish that which is of no benefit to the shipper.

Existence of a Satisfactory Through Route

The Commission seems to have thought that because the law was changed in 1910, by striking out the following proviso:

> "Provided no reasonable or satisfactory through route exists",

it was thereby empowered to require an originating carrier to short-haul itself. We respectfully submit that this is incorrect. In the first place, the above mentioned proviso had nothing to do with the limitation upon the power of the Commission, after that had been once set in motion. It puts a limitation upon the setting into motion of the power of the Commission. What was intended to be accomplished by striking out this proviso, was to enable the Commission to require a carrier to establish routes with more than one other carrier. To illustrate:

A carrier by water from, say, Cleveland, desiring to make a through route to New York, through Buffalo, selects one rail line from Buffalo to New York to make the through route, thus discriminating against all other rail lines from Buffalo to New York. This discrimination was entirely within the power of the originating carrier until the amendment of 1910, if the route which it selected was otherwise satisfactory.

The amendment of 1910 undertook to empower the Commission to prevent this discrimination. It did not

empower it to require a carrier having a single line route from origin to destination to unnecessarily short-haul itself, nor did it intend to require that the originating carrier should give up its shipments at an unnecessary transfer point which short-hauls it.

This construction of the Act gives a field of operation to each of the provisions. The force which the Commission undertook to give to the fact that this provision was stricken would completely destroy the provision against short-hauling. Of course, each part of the Act must be so construed as to give vitally to every other part thereof.

> "It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore, it is an elementary rule of construction that all the parts of an act relating to the same subject should be considered together, and not each by itself."
>
> See Lewis' Sutherland Statutory Construction, Vol. 11, Section 344.

> "Words expressive of a particular intent incompatible with other words expressive of a general intent will be construed to make an exception, so that all parts of the act may have effect."
>
> Lewis' Sutherland Statutory Construction, Vol. 11, Section 345.

> "The law will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it."

> "Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily

so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general law would operate according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act. That would be deemed an exception, unless the terms of the later general law manifested an intention to exclude the exception. If the general and special provisions are in the same act, or passed on the same day in separate acts, or at the same session of the legislature, the presumption is stronger that both are intended to operate."

Lewis' Sutherland Statutory Construction, Vol. 11, Section 346.

Competition

The Commission apparently based its initiation of these routes on its desire for competition (R. 29). We do not believe that this justifies the Commission in undertaking to establish routes. That is, we do not think that this fact was sufficient to set in motion the power of the Commission. Certainly it was not sufficient to enable the Commission to override the limitations which are placed upon its authority after that authority has been put into motion.

It is not the duty of a common carrier to surrender its rights in order that competition with itself may be created. The Commission has said that:

"The provisions of the Interstate Commerce Act with respect to the prospective consolidation of rail carriers contemplates that competition shall be preserved, but do not require that competition shall be inaugurated or increased."

See Consolidation of Express Companies, 59 I. C. C., 464.

It is only unreasonable or unjust discrimination which is prohibited by the Act. (U. S. vs. Illinois Central Ry.

Co., 44 S. C. R., 189, 192). Preferring to use that which one owns over that which someone else owns is not discrimination,—certainly not unreasonable or unjust discrimination, and this has been so recognized by the Commission.

In Waverly Oil Works Co. vs. Pennsylvania R. R. Co., 28 I. C. C., 621, the Commission said:

> "No unjust discrimination arises out of the circumstance that the different members of the Pennsylvania system accord the use of their Pittsburgh terminals to one another while refusing it on the same terms to their outside competitors."

The Courts make the same recognition, for it is held in Little Rock & Memphis Railroad Company vs. E. T. V. & G. Railroad Company, 47 Federal Reporter, 771, 776, as follows:

> "It is again the right of one to prefer one's self to another, and that cannot be an undue or unreasonable discrimination, however hardly it may bear upon that other, as long as the other is not molested in its business by a refusal to transport its passengers upon the same terms granted to the passengers of other roads."

In the same case, at page 778, it is held:

> *In either case, as we have endeavored to show, the right of preference growing out of the ownership is paramount to any demand of the public for competing lines in determining the reasonableness of the discrimination made in a case like this.*" (Italics ours).

At page 782, the court states:

> "It is a misnomer to call that which the Iron Mountain is doing 'a discrimination' against the plaintiff under the interstate commerce act, or any other careful use of that

word. It is not the case of a road preferring unjustly, unduly and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself."

It is improper to call that which the Commission undertakes to allow in this case, competition. In its last analysis, it is a defeating of competition. If the Southeastern Express Company can, by the exercise of what is called "shipper's right of routing" cause the American Company to surrender its business to it at Washington, when that business has been picked up at such expensive terminals as New York City, why should the Southeastern undertake the expense of getting into those expensive terminals where this business originates? This simply permits the Southeastern to prey upon the property and organization and initiative of the American. Such a course destroys initiative on the part of the Southeastern and on the part of the American.

The Right of a Shipper to Route Express Shipments

The order in this case not only undertakes to establish the routes, but to direct that the shipper's routing thereover shall be obeyed by the originating carrier. We have heretofore undertaken to show that the right of a shipper to route did not flow from the creation of through routes; that in the beginning, the Commission had no power to establish through routes and that this continued until 1906. The Commission was then given the power to order the carrier to establish only one through route between any two given points; that is, the power of the Commission did not come into existence if one satisfactory through route had been already established.

Of course there was no power in the shipper to route when only one route was established. There was no room for selection.

In 1910, this provision as to the one satisfactory through route was stricken from the law and on that date, and as a part of the Act striking it from the law (June 18, 1910) paragraph 8 of Section 15 was adopted, and for the first time shippers were given the right to route. The apposite part of this paragraph is as follows:

> "In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided, to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination," etc.

The establishment of through routes in and of itself did not give the shipper the right of selection between the routes. This was recognized in Congress when the law was amended in 1910, to give the shipper the right to route. (See Congressional Record, Vol. 45, p. 3476). Senator Elkins, speaking to Congress in behalf of the Senate Committee on Interstate Commerce, in his discussion of this provision, said:

> "Giving the right to the shipper to route his shipments. That is a new provision in this bill * * *. Under existing law there is no obligation by statutory provision requiring

the carrier to route the shipment by a particular through route to which the carrier may be a party."

Senator Elkins also said at page 3466 of the same volume:

> "Heretofore, shippers have never had the right, since the first Act to Regulate Commerce was passed in 1887, to choose the route over which they could ship their own freight. This right or power has always been left to the railroad companies. Under the bill, shippers have the right to direct the route of shipment of their traffic."

The progress of the law on the subject of through routes has been as follows:

(*a*) A complete absence of power in the Commission to order through routes, with the correlative right on the part of the carriers to establish such routes as they deemed fit for through transportation.

(*b*) The conferring upon the Commission of the power to establish through routes under limited circumstances, but with no power in the shipper to route his shipments, this necessarily following from the fact that only one route could be established.

(*c*) The trial of this last method from the date of the Hepburn Act in 1906 to the Amendment in 1910.

(*d*) The drawing of a distinction by the Commission in its 23rd Annual Report in 1909 between the power of the Commission to establish through routes and the right of the shipper to select between the routes.

(*e*) The enactment by Congress of the Amendment of 1910 which gave the Commission power to establish routes with somewhat less limitation than it had under the Amendment of 1906, preventing the Commission

from requiring a carrier by railroad to short-haul itself, except in the circumstances mentioned in the Act, and giving the shipper the right to select between the routes thus established as to shipments delivered to "any railroad corporation being a common carrier."

The fact that routes have been established does not give the shipper, in the absence of statute, the right of selection between those routes. Under the common law, there is no doubt but that the carrier had the right to route its shipments. The originating carrier was not obligated to enter into contracts for through carriers, and, when it did enter into such contracts and establish through routes, it could select the carriers by means of which it would establish the through route. The Commission and this Court have amply recognized the correctness of this statement. The Amendment of 1910 was, no doubt, enacted by Congress in response to the suggestion made by the Commission in its 23rd Annual Report (1909, p. 7), where it made the following statement as to through routes:

> "Railroads ought not to be required to turn over their business to a competitor, but we think the Commission should have authority to establish joint routes and through rates whenever, upon investigation, it is found the public necessity and convenience, having due reference to the interests of the carrier, require such action."

The Commission then apparently recognized that the right of the shipper to select routes did not arise from the establishment of routes, but that the initiative as to the use of routes was still with the carrier, for in the same report, at the same place, the Commission said:

> "Of much the same character is the right to route traffic. The courts now hold, apparently, that carriers have this

right or at least that they may reserve it in their tariffs and may, therefore, as a practical matter, exercise it at will.

"Ordinarily, it is immaterial to a shipper by what route his traffic moves if it reaches its destination *in due time,* upon a proper rate and *with desired delivery. In such cases there is no apparent reason why the railroad ought not to be permitted to send that traffic by whatever route it may elect.* There are, however, circumstances under which the privilege of designating the route by which the traffic shall move is a matter of convenience as well as value to the shipper, and under such circumstances, his right ought to be protected. In our opinion the Commission should have authority, after investigation, to prescribe the conditions under which traffic may be routed by the shipper."

When the matter was before Congress, the committee on Interstate Commerce in the Senate in its majority report said, with respect to the restriction providing that the Commission should not embrace less than the entire length of a railroad in a through route:

"It would seem to be unreasonable to empower the Commission to require a railroad company having a line of its own between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route *in competition with it,* thus depriving it of the natural advantages of possessing a direct line between the termini, unless such line should happen to be so much longer than the proposed new through route as to make the establishment of such new route not merely an added convenience, but a *public necessity.*" (Congressional Record, Vol. 45 p. 2819).

Here, the Senate Committee on Interstate Commerce, in the very act of reporting the 1910 amendment to the Senate, tells the Senate that it would "seem to be un-

reasonable to empower the Commission" to do that which is now sought to be done.

The Commission did not seek, and the Congress did not grant, the power to authorize the shipper to select between established routes in all cases. The Commission was to provide the rules and regulations governing the exercise of this right.

The plan adopted by the Commission for the conduct of the express business in the 24 and 28 I. C. C. reports, is based upon the distinction between rates universally applicable and the unrestricted right of the shipper to route.

In discussing the right of shippers to route, Mr. Elkins, speaking on behalf of the Senate Committee on Interstate Commerce, said that this exception to the granting of this power to the Commission

> "is one that has always been recognized in the transportation business of this country. The road that initiates the freight and starts it on its movement in Interstate Commerce should not be required, where it has a line not unreasonably long, to transfer its business from its own road to that of a competitor, especially when the commerce initiated by it can be as promptly and safely transported from the point of shipment to the point of destination by its road as by the line of its competitor."

The right of selection of routes is with the carrier even after creation of more than one route, unless expressly taken away by statute, for the reason that the initiative over a carrier's business remains with the carrier except in so far as it is taken from it by statute. In Missouri & Illinois Coal Co. vs. Illinois Central Railroad, 22 I. C. C., 39-48, the Commission said:

> "The law does not assume that the Commission will take the initiative in this matter."

The Commission was there dealing with the establishment of joint routes.

> "The establishment of a through route does not necessarily mean that the traffic must move via that route where there are other possible routes."
>
> Okla. Portland Cement Co. v. A. L. & G. R. R., 32 I. C. 225.

The Commission asked Congress to give the right of selection to the shipper. Congress, as a part of the same section, and in the same amendment to the act, and most likely for the purpose of carrying out the request of the Commission, adopted what is now paragraph 8 of section 15.

The Meaning of That Part of Paragraph 3 of Section 15 of the Act Which Empowers the Commission to Establish the "Terms and Conditions Under Which Such Through Route Shall be Operated"

It is argued that the power to prescribe the terms and conditions upon which the through routes shall be operated gives to the Commission the right to empower the shipper to designate the route, and that it enables the Commission to authorize the shipper to require the originating carrier to be short-hauled. There are several answers to this:

The quotation is applicable to traffic moving by the railroad companies as well as by express companies. To construe the language in paragraph 3 as conferring upon the Commission the power to authorize the shipper to select between established routes over railroads is to treat paragraph 8 as having no field of operation. Certainly there is no need for paragraph 8 if paragraph 3 had the meaning attributed to it.

The above quotation as to the power of the Commission to fix the terms and conditions upon which such through routes shall be operated came into the Act in 1906. In 1909, we find that the Commission declared in its official report that not only the shipper did not have the power to route shipments, but the Commission itself did not have the power to give him that right. Furthermore, at the time this quotation came into the law, the power of the Commission to establish routes was limited to those conditions where no satisfactory through route existed, and there then being no field for selection by the shipper, because the Commission could establish only one through route. This provision could not have had to do at all with the matter of routing shipments by the shipper. It had to do with the *operation of the route.*

Paragraph 8 came into the law, as we have seen, in 1910, and in the debates in Congress and the reports of the committees in Congress on the subject, there was a clear recognition that that which had been previously done did not give either to the shipper or to the Commission the power of the selection of routes for the manifest reason that there were no routes between which selection could be made.

The Commission, having decided that an express company was not within the term "carrier by railroad" under Section 15 (4) put itself into the position that it could not decide that shippers by express had the right to route under Section 15 (8), because under that paragraph of Section 15, the right to route is given to shippers who deliver their property to "any railroad corporation being a common carrier." The Commission therefore fell back upon the clause of Section 15 (3) which, after giving the Commission the power to require

through routes and joint rates provides that the Commission may prescribe the "terms and conditions under which such through route shall be operated." We have demonstrated that the Commission could not confer the right to route upon shippers under this clause of Section 15 (3) of the Act. If shippers by express have not the right to route under paragraph 8 of Section 15 of the Act, then they have not the right to route; yet the Commission held in its opinion rendered on December 7, 1920, 59 I. C. C., 518:

> "The *statutory* right of a shipper to designate the routing of his traffic, and the correlative duty of a carrier to observe his instructions, come into play only where "two or more through routes and through rates have been established", etc. (Italics ours).

The Commission there thought that the right of a shipper to route was a statutory right in the circumstances there referred to. If the right to route by express is a statutory right, that is to be found only in section 15 (8). The language of paragraph 8 of section 15 is not very apt, and narrowly construed, it may not include a shipper by express, but the debate is between the shipper having the right to route growing out of Section 15, paragraph 8, or his being without the right to route. There is much reason for holding that it is not intended that the shipper by express should have the right to route, but the American Company has thought that paragraph 8 of Section 15 should be construed in connection with the whole Section 15, and when so construed, that it should be held to be broad enough to relate to shippers of express carried over a railroad.

That there are some parts of the Act which are inapt, is recognized by the Commission in

Morgantown and Kingwood Divisions, 49 I. C. C., 540-549.

The Order Complained of is Void For That it is in Violation of the Constituton of the United States and Especially the Fifth Amendment Thereto, in that it will, if Perfected, Deprive the American Railway Express Company of its Liberty and Property Without due Process of Law

The details upon which this proposition depends have been hereinbefore stated and discussed. The case of State of Washington vs. Fairchild, 224 U. S., 510, is an exact illustration of the invalidity of an order requiring a practice which the court has determined to be unjust and unreasonable. Another is the Atchison, Topeka & Santa Fe Railroad Co. vs. U. S., 232 U. S., 199, which is sometimes known as "the pre-cooling case."

Another is Great Northern Railway Co. vs. Minnesota, 238 U. S., 340. In that case, the court held:

> "The order of a state railroad commission requiring a railroad company to install and maintain scales amounts to a taking of the company's property; and, if the order is arbitrary or unreasonable, the taking is without due process of law and in violation of the Fourteenth Amendment."

At page 345 of this opinion, the court said:

> "The facts being established, the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive."

At page 346, the court holds that:

> "The demands upon a carrier which lawfully may be made are limited by its duty," etc.

In other words, the Commission has no right to require a carrier to establish routes and to submit to the routing of traffic unless the carrier is under a duty so to do, and to order it to do that which it is not under a duty to do, with the consequent surrender of the use of its properties and its revenue, is a taking of property without due process of law.

Also see C. B. & Q. Railroad Co. vs. Wisconsin, 237 U. S., 220. This case dealt with the stopping of trains. The headnote states:

> "This court may determine whether local facilities furnished by a carrier are sufficient, that fact being necessarily involved in determining the Federal question whether an order affecting interstate trains does or does not amount to a regulation of and interference with interstate commerce."

Of course the same principles apply in determining whether or not the order of the Commission amounts to a taking of property without due process of law.

We respectfully submit that the facts in the case at bar, as they have been reported by the Commission, do not show any justification for requiring the American Company to establish the joint routes prescribed in the order; nor do they justify the Commission in requiring the American Company to submit to being short-hauled in the manner therein prescribed, upon the bare desire of the shippers; that these facts make the order unjust and unreasonable, and that it is beyond the statutory power of the Commission in the instances herein pointed out, and it also violates constitutional limitations against the taking of property without due process of law.

The order being more than a mere administrative one, these principles apply with unusual force to it; and if

the order transcends either statutory or constitutional limitations, it is not the act of the Government at all.

Section 3 of the Act is Not Involved

One of the assignments of error by the Southeastern Company is that error was committed in granting the interlocutory injunction, because "such order disregarded the limitations put upon the power of the Commission found in paragraph four of Section 15 of the Interstate Commerce Act as amended."

This refers to the exceptions contained in paragraph four of the Act, which provides, in substance, that the limitation against short-hauling shall apply "except as provided in Section 3," etc.

The court below held that Section 3 was not involved, the court saying, at the bottom of page 123 and at the top of page 124 of the Record:

> "Section 3 is not sought to be applied, and the existing routes which embrace all the lines of the American Railway Express Company between the several termini involved, are not held by the Commission to be unreasonably long."

Section 3 provides against undue and unreasonable preferences or advantages to persons, companies, firms, corporations, localities or particular kinds of traffic, and prohibits the subjecting of any particular person, company, firm, corporation, locality or particular description of traffic to any undue or unreasonable prejudice or disadvantage and makes other provisions against discriminations. It is difficult to understand how Section 3 can be applied to any circumstances which have developed in this case.

The Commission does not find the existence of any such undue or unreasonable preference or advantage, or any undue or unreasonable prejudice or disadvantage. Such undue or unreasonable discrimination is inconsistent with the findings of the Commission in this case.

Of course it is the Commission which must, at least in the first instance, determine whether a rate or practice is discriminatory.

See

Keogh vs. C. & N. W. Ry., 260 U. S., 156-164.
Great Northern Railroad vs. Merchants Elevator Co., 259 U. S., 285, 291.
Texas & Pacific Railway vs. Abilene Cotton Oil Co., 204 U. S., 426-444.
Penn. Co. vs. U. S., 236 U. S., 351.

The Commission not having found the existence of such discrimination, the court will not. The Commission's decision was inconsistent with the thought that it is based upon the existence of unjust discrimination for it is placed upon the theory that the Express Company is not a carrier by railroad, and that the express company is not entitled to the protection reserved to carriers by railroad, and that the Commission does not labor under the limitations imposed by the Act upon their authority as to those routings as when dealing with carriers by railroad. If the Commission had meant to put its decision upon the basis that the exceptions apply, they would not have put their decision upon the other ground, for, if the exceptions apply, the provision against short-hauling does not apply.

Furthermore, the Commission dealt with the subject as a whole. Unjust discrimination cannot be found in any such sweeping generalities.

Moreover, discrimination is not and cannot be involved in this case, for that at the point of the proposed transfer, there are only two carriers; one the Southeastern, and the other the American Railway Express Company, and of course it is not unjust or unlawful discrimination for the American Railway Express Company to prefer its own lines.

The Uniform Express Contract of the American Railway Express Company has Been Specifically Approved by the Commission Under the Power Conferred on it by Section 5, (1) of the Act. The Fact That it May be a Pooling Agreement Has No Bearing or Relation Whatever upon the Power of the Commission to pass the Order Which is Challenged in this Case

Judge Bryan (R. 132) held that this contract was a pooling contract and from that, in part, he reached the conclusion that

> "In establishing through routes for express companies and in dealing generally with them, the Interstate Commerce Commission *has practically unlimited power* including that to require routings by shippers to be complied with; provided always its acts are just and reasonable and not arbitrary." (Italics ours).

This point was urged by the Southeastern Express Company before the Commission but the Commission does not appear to have been influenced by it for it does not refer to it in either of the opinions in this case, and the order is not predicated in any way upon this theory.

Moreover, this particular provision of the contract has been expressly approved by the Interstate Commerce Commission in Express Contract, 1920, 59 I. C. C. R. 518, decided December 7, 1920, and the consolidation of the

express companies now represented by the American Railway Express Company, was also specifically approved by the Interstate Commerce Commission in 59 I. C. C., 459.

There is nothing in the opinion of the Commission to indicate that it does not now approve the contract. On the other hand, the only utterances of the Commission on this subject, are its approval of the organization of the American Railway Express Company, 59 I. C. C., 459, 469, and the aforementioned approval of the pooling provisions of the contract between the American Railway Express Company and the railroads, (59 I. C. C., 518). These approvals must, of course, be considered as conclusive in so far as this hearing is concerned, because the Act commits the decision of that question in the first instance to the Commission and not to the Court.

The Effect of Rule 3 of the Express Classification

Rule 3 is as follows:

> "Shippers, by designation in writing, may route shipments by way of such established routes and transfer points as they may desire."

This rule came into the express classification with the Express decisions of 24 and 28 I. C. C. The Commission desired to avoid circuitous routing. This rule was a part of its plan to this end. The Commission says of the system there established:

> "The tariffs showed that all routes were open, but the express companies' practice of using direct routes eliminated and closed just as effectively as if by tariff publication, all indirect or circuitous routing." (R. 30).

There were several express companies in existence then. The rule had the effect of permitting the shipper to select between two or more established routes.

The Southeastern construed rule 3 to mean that every route was established, and that therefore, the shipper had the right to route over all routes (R. 30). Of course that was never intended. While contending for this construction, the Southeastern filed its unlimited concurrence. The American Company filed its limited concurrence, first opening routes only between exclusive offices of one company and exclusive offices of another, and then added other established routes as experience showed that they were necessary. This was the only means then open to the American Company, by which it could make a system which would avoid circuitous routing. Where these established routes now afford alternate routes, the shipper's right to select is confined to a selection between the established routes, just as it was at the time the rule was adopted.

It was contemplated that other routes would be used in case of emergency. That is one of the features which gave flexibility to the system. The route once used, or transfer point once used for a certain sort of traffic, did not establish that route so as to give the shipper the right of routing.

Any other construction would give the shipper unlimited right of routing, which would break down the system.

Because the American routes some traffic through Washington over the Southeastern lines, which it cannot handle itself, and which it must route in the interest of the public and avoid circuity of routing, does not make

this an established route for its other business which it can legitimately haul over its own routes south of Washington without circuitous carrying.

Rule 3, by its terms, refers only to established routes. No route is open to shipper's routing before it is established, nor after it ceases to be established.

The rule was never intended as a license to short-haul the originating carrier.

The Southeastern, having refused to re-establish the Direct Routing Committee for the establishment of routes, which Committee was created under the order of the Commission of November 30, 1912 (28 I. C. C., 136), express routes have been established since its coming into existence by tariff filings. The present order contemplates the establishment of routes by such filing. That means that routes are not established except as they are covered by such filing. Rule 3 operates to give the shippers the right to select between two or more routes established by such filing. The rule never had any other meaning. The method of establishing routes was different before the Southeastern's refusal to re-establish the Direct Routing Committee.

With the determination that the originating carrier should not be short-hauled in the circumstances herein set out, no doubt the Direct Routing Committee will be re-established and the system will drop back into the original plan of the Commission.

It is respectfully submitted that for each and all of the reasons herein set out, the decision appealed from should be affirmed.

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APPENDIX NO. 1

The Development of the Statutory Power of the Commission to Establish Through Routes

1.

The first grant of power to establish through routes is to be found in the Hepburn Act of June 29, 1906.

Section 15 of the Act to Regulate Commerce, as amended by the Hepburn Act, contained the following:

> "The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such routes as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provisions of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."
>
> 34 Stat. L., 589, 590.
>
> 4 Fed. Stat. Ann. (2nd Ed.) 475.

It will be noticed that this amendment to the Act authorized the Commission to prescribe "the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provisions of this Act, etc."

In 1909, in its 23rd Annual Report, the Commission states, as has been pointed out in the brief, that the carriers had the right to route the traffic or that they might preserve that in their tariffs. The Commission did not think then that this power gave them the right to estab-

authorize shippers to route
~~lich routes~~ and they substantially so stated to Congress and Congress did not think so as we have heretofore pointed out.

2.

The next change in this part of the Act was brought about by the Act of June 18, 1910, and is embraced in Section 15 (C), (D), and (E), which said paragraphs of said Section are as follows:

Section 15 (C):

> "The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated, whenever the carriers themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates; and this provision shall apply when one of the connecting carriers is a water line. The commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor shall the commission have the right to establish any route, classifications, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552)."

Section 15 (D):

> "And in establishing such through route, the commission shall not require any company, without its consent,

to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith which lies between the termini of such proposed through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established. (24 Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 552.)"

Section 15 (E):

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportion subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to much reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported. (24

Stat. L. 384, as amended by 34 Stat. L. 589, 36 Stat. L. 553.)"

4 Fed Stat. Ann. (2nd Ed.) 469-471.
36 Stat. L. 552-553.

The principal changes brought about by the Act of 1910 in the Act of 1906 may be summarized as follows:

(a) The Commission was authorized to proceed upon its own initiative.

(b) It eliminated the condition as to the necessity of a reasonable or satisfactory through route.

(c) It restricted the right so that it would not apply to certain sorts of electric passenger railways and to carriers wholly by water.

(d) It added the requirement found in 15 (D) against short hauling.

(e) It gave to shippers the right of selection of routes when the property was delivered "to any railroad corporation being a common carrier."

3.

The next change was in 1920, and the Act of February 28, 1920, in so far as applies to the matter specially in hand, is as follows:

Section 15 (3)

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be

charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."

Section 15 (4)

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish tempo-

rarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15 (6)

"Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions therof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

Section 15 (8)

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading; *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

The principal changes worked by this Act are as follows:

(a) The right to establish routes within the limitations of the Act was made obligatory upon the Commission "whenever deemed by it to be necessary or desirable in the public interest."

(b) "Maxima or minima" or "maxima and minima" rates could be fixed by the Commission.

(c) Certain changes as to carriers by water, not necessary now to consider.

(d) Substituting the phrase "carrier by railroad" in the fourth paragraph of Section 15 for the word "company."

(e) Provide exceptions as follows: "Except as provided in Section 3 and except where one of the carriers is a water line."

(f) It provided additional powers to the Commission in cases of emergency.

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IN THE

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OCTOBER TERM, 1923.

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v.
AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 666

SOUTHEASTERN EXPRESS COMPANY, Appellant,
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AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 667

SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU and SOUTHERN FISHERIES ASSOCIATION, Appellants,
v.
AMERICAN RAILWAY EXPRESS COMPANY and SEABOARD AIR LINE RAILWAY COMPANY, Appellees. } No. 668

BRIEF FOR SEABOARD AIR LINE RAILWAY COMPANY.

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IN THE

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BRIEF FOR SEABOARD AIR LINE RAILWAY COMPANY.

The references to pages of the transcript of record contained in this brief indicate the record printed in No. 667. By stipulation, the record in each of the above cases

is the same except as to formal parts. Each case is an appeal from the same order or judgment, and the only record which is complete within itself is that in which the Southeastern Express Company is the appellant.

STATEMENT OF FACTS.

Seaboard Air Line Railway Company filed in the Court below its petition for intervention in this cause, praying that it be made a party plaintiff. (Transcript pp. 46-50). The petition was duly verified, and the Court allowed the intervention.

The intervention speaks for itself, and the intervenor has no desire to burden the Court with an extensive argument, but thinking that the filing of a short brief may facilitate the deliberations of the Court, the intervenor sets forth herein a short statement of its contentions as embodied in the petition for intervention, and a summary of the facts upon which it relies for relief.

Seaboard Air Line Railway Company is a common carrier by railroad, engaged in the transportation of persons and freight in interstate commerce. It has a line of railway, among others, extending from Birmingham, Alabama, to Atlanta, Georgia, and from Atlanta to Richmond. From Richmond, Virginia, it has traffic arrangements with the Richmond, Fredericksburg and Potomac Railroad which, although a separate corporation, is owned in part by the Seaboard.

Under traffic arrangements with the Richmond, Fredericksburg and Potomac, the trains of intervenor, both freight and passenger, operate into Washington, and under traffic arrangements existing between the Seaboard and the Pennsylvania System, the Seaboard is enabled to maintain service for both freight and passengers from Birmingham,

Alabama, through Atlanta, thence to Washington, and on into the City of New York. This freight and passenger service embraces all intermediate points and reaches other points on connecting lines. The record (Transcript p. 47) shows that the intervenor does not, in its capacity as a common carrier by railroad, maintain directly a transportation service of the kind commonly termed an express service. Transportation of express and express matter is, however, an important portion of intervenor's railroad business, and is a necessary service for the industries and persons which intervenor serves.

Intervenor has entered into a contract with American Railway Express Company (Transcript pp. 51-91) under the provisions of which the latter does an express business over the lines of intervenor. The gross operating revenues accruing from said express business amount, approximately, to the sum of one million dollars per annum. (Transcript p. 48). In these revenues intervenor participates.

The cars in which express is transported by American Railway Express Company are supplied by intervenor. Intervenor also supplies the roadbed and rails, and all other railroad equipment, including the motive power and rolling stock, together with the crews necessary to operate the trains upon which the express is transported.

Because of the fact that the Seaboard Air Line Railway Company is a common carrier by railroad, and is in effect carrying on an express transportation business through the medium of the American Railway Express Company, the Seaboard Air Line Railway Company claimed, in its petition for intervention, the protection of the Fifth Amendment to the Constitution of the United States, and of the protective provisions contained and set out in the fourth paragraph of the fifteenth section of the Act to Regulate Commerce.

The intervenor further showed, in and by its petition for intervention, that in anticipation of enjoying the fruits of its contract with the American Railway Express Company, and as a matter of necessity in order to take care of express business arising thereunder, it had been forced to lease from the Arms-Yager Railway Car Company fifty (50) extra cars at a gross rental of one hundred eighteen thousand six hundred and twenty-five (118,625.00) dollars per year; that in order to supply the necessary equipment for said cars, including steam heat fixtures and lights, the sum of eighteen thousand two hundred nine dollars and twenty-eight cents ($18,209.28) has been expended, fifty (50%) per cent of which was paid by the Seaboard Air Line Railway Company; that subsequently intervenor found it necessary to lease twenty (20) additional cars at an expense of forty-seven thousand four hundred and fifty (47,450.00) dollars per year; that said cars are leased for periods expiring April 30, 1924, and June 15, 1924, respectively.

The petition for intervention also showed the facilities which had been provided for the handling of express, and charged that the effect of the order of the Interstate Commerce Commission in the original bill complained of, would be to deprive intervenor of the haul over its own through routes of such express originating in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut and New York, and upon all points on the direct routes of the American Railway Express Company between New York and Washington, as might be directed to be diverted therefrom at Washington.

ARGUMENT.

In the brief which has been filed by appellant Southeastern Express Company, the right of the Seaboard Air Line Railway Company to contest the order of the Commission, complained of in the original bill of complaint, is challenged

upon certain grounds which may be summarized as follows:

1. To allow the Seaboard Air Line Railway Company to enjoy the fruits of its contract with the American Railway Express Company, would be discrimination as against the Southern Railway Company.

2. To allow the Seaboard to continue to make use of the facilities for handling express which it has provided, would be to delay the handling of express to certain Southeastern Express Company Stations.

We respectfully contend that neither proposition asserted by the appellant is well founded, either in law or in fact.

The argument of the Southeastern Express Company would make it appear that the American Railway Express Company is seeking to bolster up a doubtful right to assert a protection under section fifteen of the Act to Regulate Commerce, by bringing into the case on its side of the controversy, a corporation which is beyond question a "common carrier by railroad."

We respectfully state to the Court that the Seaboard Air Line Railway Company is in the case to protect its own property rights. While we believe the American Railway Express Company to be a "common carrier by railroad" within the meaning and spirit of the Act to Regulate Commerce, and as such entitled to protection against an attempted order of the Commission which would require it to "short haul" itself, the Seaboard Air Line Railway Company is not here presenting the contentions of the Appellee Express Company.

These contentions have been fully argued in a brief filed herein by the Appellee Express Company.

The Seaboard Air Line Railway Company does assert, on

its own account, that it has provided facilities for the handling of an express business, which it is entitled to handle under the law and by virtue of its lawful contractual relationship with the American Railway Express Company.

Having provided facilities which it was required to provide in order to handle the business, and to carry on its functions as a common carrier, and which it was its duty to furnish, under the law, it has the right to use those facilities.

Atchison, Topeka and Santa Fe Railway Company vs. United States, 232 U. S. 199.

The Seaboard Air Line Railway Company has, furthermore, the right to the long haul over its own rails, and through facilities which it has provided, unless any such through route would be unreasonably long as compared with another practicable through route which could otherwise be established.

The Seaboard Air Line Railway Company does not contend, as would appear from the brief of the appellant, Southeastern Express Company, that the Southern Railway Company should be eliminated from all competition with it. What the Seaboard Air Line Railway Company does contend, is that it has the right to be in this case to protect its own property interests which would be infringed and violated by any order of the Commission which would virtually deny to the American Railway Express Company the right to carry express business which it originates, over the routes which it has established, and which the Commission has found to be reasonable and satisfactory.

It is respectfully submitted that paragraph three of section three of the Act to Regulate Commerce contains nothing which would restrict the Seaboard Air Line Railway Company in the enjoyment of its rights under said contract.

Nor are the decisions and authorities cited in the brief of appellant relevant in any attack upon the position of the Seaboard Air Line Railway Company. No discrimination as against the Southern Railway System results from an exercise on the part of the Seaboard Air Line Railway Company of its legal right to enjoy the fruits of its contract with the American Railway Express Company, and to utilize the facilities which it has provided for the handling of express business in conjunction with the other contracting party.

Appellee Seaboard Air Line Railway Company deems it unnecessary to argue **in extenso** the second proposition asserted by appellant Southeastern Express Company in its attack on the intervention of the Seaboard Air Line Railway Company, viz.: that the handling of express matter over the routes provided by the American Express Company over the lines of the Seaboard Air Line Railway Company results in delays and unsatisfactory service.

That the Commission did not so find is apparent from a study of the proceedings before the Commission and which are in the record (Transcript pp. 17-43). The order of the Commission, complained of in the original bill, in its broad generality takes no account of whether or not the through routes, undertaken by the Commission to be required, are within the exceptions and provisos of paragraph four of section fifteen of the Interstate Commerce Act, or whether or not the same would be in conflict with the prohibitions of said paragraph of said section. Isolated instances of alleged circuitous routing were not considered and passed on by the Commission. It is no answer to the position of the intervenor for the appellant to go outside of the record at bar and undertake to discuss what are claimed to be unreasonable routes.

The case made in the record before the Court, is a case of a general sweeping order which affects the entire business of the American Railway Express Company and also of

the Seaboard Air Line Railway Company. Reasonable through routes and unreasonable through routes (if any) stand alike in the judgment of the Commission. No attempt is made in the order of the Commission to differentiate between the service from Washington to Atlanta, admittedly reasonable and satisfactory and so found by the Commission, and the service between Washington and exclusive Southeastern Express Company points. It is patent from any consideration of the case, that the Commission did not have in mind any determination of the reasonableness or unreasonableness of the service provided by the American Railway Express Company to any particular station or stations. The requirement of the Commission was, to establish new through routes regardless of the sufficiency or reasonableness of existing through routes.

Under these circumstances, therefore, we respectfully assert that it is beside the case to question the right of the Seaboard Air Line Railway Company to invoke the protection of the Courts as against the sweeping force and effect of an order which would tear down its business and invade its property rights, merely because the Commission might hereafter, in another case, direct some change in the handling of express matter from Washington to particular points.

We respectfully ask of the Court the affirmance of the judgment below.

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SOUTHERN TRAFFIC LEAGUE, ATLANTA FREIGHT BUREAU AND SOUTHERN FISHERIES ASSOCIATION, *Appellants.* v. AMERICAN RAILWAY EXPRESS COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY, *Appellees.*	No. 668.

REPLY BRIEF OF AMERICAN RAILWAY EXPRESS COMPANY.

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REPLY BRIEF OF AMERICAN RAILWAY EXPRESS COMPANY.

We believe that our main brief and this reply cover the contentions set forth in the briefs filed by

the various Appellants, and we shall endeavor to avoid repetition. In this reply we direct our argument specifically to matters referred to in the brief of the Southeastern Express Company.

I.

The Commission did not decide either directly or indirectly in the Express Cases (24 I. C. C. 380 and 28 I. C. C. 132) that the provision of the Act prohibiting the short hauling of a carrier did not apply to Express Companies.

The Southeastern Express Company all through its brief takes the position that the Interstate Commerce Commission in these two Express cases decided in substance and effect that the limitation in the Act prohibiting the short hauling of a carrier by railroad did not apply to Express Companies.

1. The Commission does not mention in either of the Express cases the provision of the Act which was then in effect which prohibited short hauling. The Commission did not have in mind any distinction as to this matter between a railroad company and an express company because the Commission frequently refers in these two decisions to an express company as an agency of the railroad or as an arm of the railroad.

2. The attention of the Commission in these two cases was directed to two prime objects, first, to devise a system of rates whereby the same rate would be applicable between any two places irre-

spective of the route over which the shipment moved; and in order to build up this system of rates all of the express companies were treated as a unit. This was the only respect in which the Commission ever undertook to treat the eleven different express companies as a unit. The second object the Commission had in view was to prevent circuitous routing.

3. The Commission did not have in mind any distinction between express companies and railroad companies in the matter of routing of shipments, for in the opening passage of the decision in 24 I. C. C., at page 387, the Commission said:

> "The Act to regulate commerce now imposes upon all of the railroad carriers the obligation to make through routes and to furnish proper facilities for the transportation of freight. This rule applies to parcels as to carloads. The Act also by name recognizes the express company as a carrier subject to our jurisdiction. We must, therefore, regard these great forwarding companies as agencies created by the railroads, etc."

4. Under the head of "Causes of Complaint" the Commission listed:

> "3. Indirect routing of shipments by the express carrier resulting in unreasonable delays and defeating the reason for the existence of an express service as distinguished from ordinary freight service" (24 I. C. C. 388).

5. Under the head of "Circuitous Routing of Shipments", the Commission said:

> "We find, however, that it has been the custom of the express carriers when shipments have been intrusted to them for delivery at

> points not on the lines of railroad over which they operate, to retain possession of the shipment *so as to receive the longest possible haul* via their own lines. The result has followed that many shipments have been carried by round about routes before being delivered to the final carrier" (Italics ours) (24 I. C. C. 392).

We do not contend in this case for the longest possible haul by the American lines. We only contend for the right to hold the traffic which we originate to our own lines as long as we can reasonably do so. The Commission then decided that in order to avoid this circuitous and indirect routing "the express carriers must unite in direct through routes reaching all cities and towns accessible to each other by the shortest route measured in time" (24 I. C. C. 382, 393, 433).

The Commission did not have in mind short hauling a carrier. The Commission was simply providing for direct through routes. In order to control the matter of routing, the carriers themselves first created a joint routing committee (24 I. C. C. 394), and afterwards a Direct Routing Committee was created, in which the Commission itself participated (28 I. C. C. 136).

6. On page 411 of the decision in 24 I. C. C., the Commission was discussing Rule 16, which provided, first, where a shipment passed over the lines of two or more companies that the rates should be made by combining the local rates of each company via the transfer point which would produce the lowest through rate; and, secondly, the rule made provision for the division of the through rate. The block and zone system of rate making established by the Commission nullified the first part of Rule 16, which provided for the making of the through

rate on the combination of the locals. The Commission then said:

> "The remaining provisions of the Rule concern the division of earnings. We have said to these carriers in connection with the discussion of the establishment of through routes and rates, that in their arrangements for the division of earnings due consideration should be given by the connecting carrier to the surrender by the originating carrier of its right to retain possession of the shipment for the longest possible haul via its own lines, and that divisions shall be agreed upon which shall compensate the originating carrier for its sacrifice."

This portion of the decision is quoted in the brief of the Southeastern Express Company (see p. 66 of the brief in connection with pp. 81 and 89) as though it were a decision by the Commission that the originating carrier of express was not entitled to the long haul. In the first place, the extract from the decision recognizes the originating carrier's *right* to the long haul. We do not contend that an express company is entitled to the longest haul possible via its own lines. The Commission recognized that it was a sacrifice to take the shipment away from the originating carrier short of destination and that it should be compensated therefor in the divisions. But this is very far from saying or intimating that where a carrier had a reasonable direct through route to destination that it could be short hauled by its competitor and compensated therefor by a division of the rates.

A great many references are made in the brief of the Southeastern Express Company to the argument that express companies were made a national system or a unit by the Express Case in 24th I. C. C.

Similar language has been used in reference to railroads. See Lumber Rates from Texas, etc., 28 I. C. C. 471, 474, citing and quoting from 22 I. C. C. 39, 46, where the following appears:

> "Our railroads are called upon to so unite themselves that they will constitute one national system; they must establish through routes, keep these routes open and in operation, furnish the necessary facilities for transportation, make reasonable and proper rules of practice as between themselves and the shippers, and as between each other."

This obligation to establish a national system has never been construed or thought to include the right to short-haul, and of course it does not, and just as it does not as to railroads, so it does not as to express companies.

II.

Some of the contentions in the brief of the Southeastern Company as to Section 15(4) of the Interstate Commerce Act.

1. On page 44 of its brief the Southeastern Express Company states: "In the grant of power in Paragraph 3 of Section 15, in defining therein the jurisdiction and duties of the Commission, the broad designation 'any common carrier or carriers, subject to the Act' is employed." This statement is repeated twice again in the brief, bottom of page 37, page 38. Upon this predicate the Southeastern Company argues that the employment of the term "carrier by railroad" in paragraph 4 of Section 15 being a narrower term than "any common carrier or carriers subject to the Act", it was therefore the

intention of the Commission to exclude express companies. There is no such phrase as "any common carrier or carriers, subject to the Act" in paragraph 3 of Section 15. Paragraph 3 of Section 15 gives power to the Commission to establish through routes and joint rates "applicable to the transportation of passengers or property". And under this language Express Companies are included. Paragraph 4 then provides, "In establishing any such through route" the Commission must not short haul a carrier by railroad. The last clause of paragraph 3 excepted water lines; therefore paragraph 4 provided that "in establishing any such through route" carriers by railroad should not be short hauled.

2. The reason the phrase "any carrier by railroad" is used in Section 15(4) is because it was not intended to include carriers by water, or by pipe line, or any other kind of a carrier except carriers by railroad. When the Act of 1920 inserted in the parenthesis the exception "where one of the carriers is a water line" the phrase "any carrier by railroad" was substituted for "any company" because of the exclusion of a carrier partly by rail and partly by water; and also because the last clause of paragraph 3 excepted a carrier wholly by water. The change from "any company" to "any carrier by railroad" does not weaken but strengthens our position.

3. The Southeastern argues that the phrase "any carrier by railroad" should be interpreted so as to read "any carrier which owns or operates a railroad". If Congress had intended so to restrict the paragraph, it would have said so. The word "by" is used to describe the kind of transportation employed and was not employed to indicate that the

carrier must own or operate the railroad. No reason has been suggested why the limitation should not apply to an express company which carries by railroad, as well as to a railroad company which carries by railroad. In one or two places in its brief the Southeastern refers to a carrier *by* express. This is not an accurate designation of an express company. It may be referred to as a carrier *of* express but hardly as a carrier *by* express. The Southeastern Company argues that this paragraph cannot apply to an express company because the paragraph speaks of "the entire length of its railroad and any intermediate railroad operated in conjunction or under a common management or control therewith". Congress was merely describing the route of the carrier which could not be short hauled. In striking out the words "any company" and substituting "any carrier by railroad" it was not necessary to change the language describing the route which the Commission was prohibited from short hauling. The language, when its purpose is considered and the connection in which it is used, certainly does not require the interpretation for which the Southeastern contends. If an express company is included within the expression "any carrier by railroad", there is no difficulty about the application of the paragraph so far as the route is concerned.

4. The Southeastern refers in its brief, page 48, to Section 300 of the Transportation Act which creates the Labor Board. The first paragraph of Section 300 is as follows:

> "Section 300. When used in this title—
>
> "(1) The term 'carrier' includes any express company, sleeping car company, and any carrier by railroad subject to the Interstate Commerce Act, etc."

The Southeastern argues that this is a legislative definition—that an express company and a sleeping car company are not carriers by railroad. This section of the Transportation Act is not a part of the Interstate Commerce Act and is not an amendment of it. Congress did not mean by this definition of the term "carrier" to say that an express company or a sleeping car company were not carriers by railroad. Section 300 was defining the term "carrier"; it was not defining the term "carrier by railroad". The fact is that Congress desired to make the section applicable to carriers by railroad and therefore provided that the term "carrier" should include any express company, sleeping car company, and any carrier by railroad. This is very far from saying or intimating that an express company or a sleeping car company is not a carrier by railroad.

In construing the Interstate Commerce Act, it should be remembered that the phrase "carrier by railroad" is nowhere employed in the original Act or in its many amendments until the Act of June 29th, 1906 (34 Stat. 584) and that the first and only place in which it is used in this amendment is in Section 2 amending Section 6 of the original Act (p. 586) in which the phrase is used to distinguish carriers by railroad from carriers by pipe line or by water.

When carriers by pipe line and carriers by telegraph, telephone, and cable, and carriers of express, and sleeping car companies were all introduced into the Act, it then became necessary to use a short phrase such as "carriers by railroad" to describe such carriers as used that instrumentality. Whenever it is desired to refer to all the carriers subject to the Act, the Act employs the term "car-

riers" or "common carriers" or "carriers subject to the Act". It is undoubtedly true that in some places in the Act the phrase "carrier by railroad" is used where it is obvious from the context that only a carrier which operates a railroad is intended. Where the context does not clearly show that it was intended to so restrict the meaning of the phrase, it should not be so restricted. Unless the phrase "carrier by railroad" was sufficiently comprehensive to include an express company which used a railroad in the carriage of its business, the case of Wells-Fargo & Company *v.* Taylor, 254 U. S. 175, would never have arisen. The question in that case was whether, considering the context and the purpose of the Act, express companies were included. The phrase itself was broad enough to include them. The Court had to resort to the test of construction according to the context of the Act in order to exclude them. For instance: In the Locomotive Ash Pan Act (35 Stat. 486) and in the Safety Appliance Act (27 Stat. 531) and in the Accident Report Act (36 Stat. 350) it is obvious enough that express companies are not included, although the phrase "carrier by railroad" or similar phrase is used.

5. On page 47 of the brief of the Southeastern Company a reference is made to Section 209 of the Transportation Act of 1920, which provides the guaranty to carriers after the termination of Federal control. This section defines the term "carrier" as follows:

> "(1). A carrier by railroad or partly by railroad and partly by water, whose railroad or system of transportation is under Federal Control at the time Federal Control terminates, etc."

> "(2). A sleeping car company whose system of transportation is under Federal Control at the time Federal Control terminates."

There was only one express company at this time, namely, the American Railway Express Company, and it was included by its name. This is argued by the Southeastern as a legislative definition of the phrase "carrier by railroad". This section is not an amendment to the Interstate Commerce Act. We are here dealing with the "Dictionary of the Act" to regulate commerce. It is quite obvious that the carrier by railroad described in the first paragraph of Section 209 is the carrier *whose railroad or system* of transportation is under Federal Control. This section of the Transportation Act was providing a guaranty to the Railroad Company which owned the railroad and which as owner of the railroad would be entitled to the guaranty; therefore, it used the expression "a carrier by railroad or partly by railroad and partly by water, *whose railroad or system* of transportation is under Federal control at the time Federal control terminates". (Italics ours.) If Congress had not made special provision for the sleeping car company and the American Railway Express Company in subsequent paragraphs of Section 209, they would naturally have been excluded by the language of paragraph 1 of Section 209.

The Southeastern Express Company argues in its brief, page 62 that:

> "Terms which may be used to describe the character of, and means by which, an express company conducts its business, do not necessarily or even argumentatively describe its individual person when its amenability to, or exemption from, regulatory particulars is being considered."

If that statement is true, then every express company and every other common carrier in Interstate Commerce is under the terms of the Act. Everybody knows that this is not true, and the "means by which an express company conducts its business" is the exact thing which determines whether or not an express company is within or without the terms of the Act.

III.

The construction by the Interstate Commerce Commission of the phrase "carrier by railroad".

This subject is dealt with by the Southeastern Express Company in its brief pages 54 to 67, and the Southeastern Express Company says at page 63, "This departmental construction is entitled to the utmost weight in this case", and again on page 62 of its brief the Southeastern Company says:

> "We have thus painstakingly traced the construction which the Commission has placed upon the term 'carrier by railroad' as used in different portions of the Interstate Commerce Act for the purpose of demonstrating that invariably that tribunal has confined that term to the *owner, proprietor or operator* of railroads, and has never undertaken to exercise over express companies and other companies, not owning or operating railroads, the powers and control vested in it by Congress where the grant of power used the specific term 'car rier by railroad'."

We propose to review very briefly the cases cited by the Southeastern which we think will demon-

strate that there is nothing in this contention of "departmental construction".

1. The case of Baltimore & Carolina Steamship Company *v.* A. C. L. Railroad, 49 I. C. C. 176, is cited at page 55 of the Southeastern Company's brief. In that case the only question was whether the Commission had jurisdiction to establish through routes between a railroad company and a steamboat line. In the course of the opinion the Commission said at page 184: "The limitation in Section 15 refers specifically to railroads and apparently was intended to insure to the originating rail line as large a share as possible of the movement of freight by rail." In other words, the Commission said that the limitation did not refer to a combination of a rail and water line. The question as to whether it referred to an express company was not even remotely involved.

2. The cases in 57 I. C. C. 591 and 63 I. C. C. 375, which are referred to on pages 56 and 57 of the brief of the Southeastern Company, both involved the question as to whether paragraph 2, section 3, of the Interstate Commerce Act was applicable to freight moving wholly or partly by water. This provision of the Act is to the effect that *no carrier by railroad* shall deliver freight at destination until the charges are paid, except under such rules and regulations as the Commission may prescribe. The Commission simply held that a carrier wholly by water and a carrier partly by water and partly by railroad was not a carrier by railroad within the meaning of this Section of the Act. Neither of these decisions touch an express company.

3. The Southeastern in its brief at pages 58 and 59 refers to Oyler & Son *v.* American Railway Ex-

press Company, 83 I. C. C. 160, and *in re* Transportation of Strawberries by Express, etc., 81 I. C. C. 634. These two decisions merely hold that the car service provisions of the Interstate Commerce Act do not apply to express companies. The case first cited was decided by the Commission in part upon the authority of its decision in the case at bar. The Commission did hold in the case at bar that an express company was not a "carrier by railroad" under Section 15, Paragraph 4, of the Act. If the Commission was right in its decision in the case at bar that an express company was not included under Section 15, Paragraph 4, then *a fortiori* an express company was not included under the car service provision. Obviously, an express company, considering the context of the car service provision (Sec. 1, Par. 10-17), is not covered by the provision.

4. In 70 I. C. C. 575 and 71 I. C. C. 7, cited on page 59 of the Southeastern Company's brief, the Commission held that the Chicago, New York and Boston Refrigerator Company was not covered by Section 209 of the Transportation Act 1920, which is the Guaranty section of the Transportation Act. This section is not a part of the Interstate Commerce Act. The Refrigerator Company was not within the provision "carrier by railroad" because it was not a carrier at all. This Refrigerator Company merely owned cars which it leased to railroads. It had nothing whatever to do with the transportation of freight in the cars. The Supreme Court of the United States in the case of Armour Car Lines, had already decided that these car lines were not carriers subject to the Act to Regulate Commerce (Ellis *v.* I. C. C., 237 U. S. 434).

The two cases in 72 I. C. C. 169 and 72 I. C. C. 809, cited on page 61 of the Southeastern Company's brief are both cases where companies owning grain elevators tried to get in under the Guaranty provision of Section 209 of the Transportation Act of 1920, and it was decided very properly that neither of them were carriers.

5. On page 65 of the Southeastern's brief the express cases, 24 I. C. C. 380, 28 I. C. C. 132, are referred to as decisions by the Commission holding that the provisions of the Act as to short hauling a carrier did not apply to express companies. In the first part of this brief we have shown that these express cases did not either directly or indirectly decide this question.

6. The cases above cited are the cases relied on by the Southeastern as "departmental construction entitled to the utmost weight in this case". The cases cited simply do not touch the question at issue here.

IV.

Reply to the contention that the Commission derives the power to confer on shippers the right to route from Section 15 (3); and that Section 15 (8) was enacted in order to give shippers the right to route over through freight routes voluntarily created by railroad companies.

These contentions of the Southeastern Express Company are contained in its brief, pages 167-178.

We have already shown in our main brief that the Commission did not derive power to confer on shippers the right to route from the clause in Section 15(3) which gives the Commission the power in making through routes to establish "the terms and conditions under which such through routes shall be operated". We showed that this clause came into the Act by the amendment of June 29, 1906 (34 Stat. 590), and that in 1909 the Commission in its 23rd annual report represented to Congress that under the Act shippers did not have the right to route and that the Commission could not confer such a right on them, and, in response to this suggestion of the Commission, Congress on June 18, 1910 (36 Stat. 539), enacted the provision as it now stands in Section 15(8), giving the shippers the right to route.

The Commission having decided that express companies were not included within the term "any carrier by railroad" under Section 15(4), had practically precluded itself from holding that express companies were under Section 15(8) because in Section 15(8) the right to route related to prop-

erty delivered "to any railroad corporation being a common carrier" and therefore the Commission fell back on the power to establish the terms and conditions under which through routes shall be operated.

Now the Southeastern Express Company undertakes to dig the Commission out of this hole by contending first, that Section 15(8) was enacted for the purpose of giving shippers of freight the right to route over through freight routes *voluntarily* established by railroad companies, and secondly, that through express routes are not voluntarily established by express companies as are through freight routes by railroad companies.

1. The Southeastern contends especially on page 170 of its brief that there is a substantial difference in the manner in which through express routes are created and through freight routes. It says that through freight routes are in large measure voluntarily created by the railroad companies, whereas through express routes were all prescribed and created by the Commission in the Express Cases. This is the very thing which the Commission did not do in the Express Cases. It found it a wholly impracticable thing to do. The only thing the Commission did do was to provide by general order that express should be routed along the most direct routes in point of time. In the decision in the first Express Case, 24 I. C. C. at pages 393 and 394, it left the matter of routings to a joint routing committee of express companies, and in the second decision in 28 I. C. C. 138, a Direct Routing Committee was organized, and routes were abolished and established by voluntary action as the exigencies of the traffic required. When there were eleven express companies in the field, both before and after

the decision in the Express Cases, the routes were voluntarily established in large part by the express companies and not by the action of the Commission.

2. The idea that Section 15(8) of the Act was enacted so as to give shippers the right to route over through routes *voluntarily* established by carriers of freight is wholly unsupported by anything in the Act itself. Certainly the Committees of the Senate in dealing with the subject had no such conception, as we pointed out in our original brief.

Section 15(8) provides: "In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates *shall have been established as in this Act provided,*" then the shipper shall have the right to route. On its face this section relates to through routes established as in the Act provided, that is to say established either by the Commission or established voluntarily by the carrier. The notion that a shipper of express gets the right to route under Section 15(3) and not under Section 15(8) and that a shipper of freight gets the right to route under Section 15(3) as to routes established by the Commission and under Section 15(8) as to routes established by voluntary action of the railroad company, is wholly unsupported by anything in the Act, or by any supposed distinction between express business and freight business.

We have already discussed in our main brief the propositions that the creation of through routes and joint rates are entirely different matters from

the shipper's right to route, and that the Commission had this right to create through routes and joint rates before it ever had the power to confer on shippers the right to route.

We have also discussed in our main brief the contention that it would be futile to create through routes unless at the same time shippers were given the right to route, and we have there shown that through routes are established mainly so that carriers may route over them. In point of fact, shippers never had any right to route until 1910.

3. We have not contended that shippers did not have the right to route over properly established routes. We have said that we thought that Section 15(8), construed with the other sections with which it is associated, gives the shippers of express matter the right of selection where two or more through routes are properly established, but that the Commission could not establish a route and short-haul an express company by giving shippers the right to route, because of the limitation upon the power of the Commission contained in Section 15(4). Our contention is that unless the right to route is conferred by Section 15(8) it is not conferred at all.

4. The Interstate Commerce Commission has substantially held that Section 15(8) does include an express Company. In the Matter of the Express Contract, 1920, 59 I. C. C. 518-522, the Commission says:

> "the *statutory* right of a shipper to designate the routing of his traffic and the corelative duty of a carrier to observe his instructions come into play only where *'two or more through routes and through rates shall have*

> *been established'* and there is *'a connecting line'* to which the initial carrier can make delivery pursuant to the instructions." (Italics ours.)

It will be noted that the Commission is here dealing solely with shipments of express matter. It speaks of *"the statutory right"* of the shipper to route. It then makes quotations supporting "statutory right", and we turn to Section 15(8) of the Act and find that the quotation is taken from that section and paragraph. This means, of course, that the Commission treated this paragraph as being applicable to express companies. One may search in vain for any other basis of "statutory right" of a shipper to route, or for any other place in the Act where the quotations made by the Commission appear.

5. At page 172 of its brief the Southeastern Express Company argues that the Commission in prescribing the shipper's routing as a part of its system of express rates evidently did not deal with express companies as carriers by railroad falling within the terms of paragraph 8 of Section 15, since, had it so regarded express companies, the orders as to shippers and routing would have been superfluous, as the right would automatically attach under paragraph 8 of Section 15. The Commission was dealing with the system in which the express companies reserved the right to themselves to route shipments. (24 I. C. C., p. 405.)

The Commission adopted Rule 3, which provided that

> "Shippers, by designation in writing, may route shipments by way of such established routes and transfer points as they may desire."

This language is certainly inspired by paragraph 8 of Section 15. Much of it, in fact, is a paraphrase of this section. Note the language at the bottom of page 393, 24th I. C. C., which is referred to under the subject "Routing", page 405. In providing for the establishment of routes the Commission, at page 393, 24th I. C. C., said:

> "The Consignor shall have the right to designate in writing the joint through route thus established and published, by which the specific shipment shall move."

The Commission intended to there treat the express company as being included in the phrase "any railroad corporation being a common carrier".

V.

Section 3 of the Interstate Commerce Act is not involved in this case.

The Southeastern Express Company in its brief at pages 117 to 153 contends that this case falls under Section 3 of the Act, and, therefore, paragraph 4 of Section 15 is not applicable because by its terms it is not applicable where a case falls under Section 3.

Section 3 is the section which makes it unlawful for a carrier to give undue or unreasonable preference or advantage to any particular person, locality or description of traffic or to subject them to any undue or unreasonable prejudice or disadvantage.

1. The Commission did not find that Section 3 of the Act was involved. It did not pronounce anything that the American did or omitted to do as an

undue or unreasonable preference or advantage to any person, locality or traffic. The Southeastern Express Company has quoted certain passages from the opinion of the Commission as though they were findings of the Commission on this subject. Instead of being findings they are recitations of the contentions of the parties. Thus the portion of the opinion of the Commission quoted in the Southeastern brief at page 131. If the Court will read this extract from the opinion of the Commission in connection with the paragraph which immediately precedes it, both of which are to be found on page 32 of the record, it will be seen that the Commission was here merely reciting the contentions of the parties.

2. The majority of the special court in their opinion (Record, bottom p. 123, and top p. 124) find that:

> "Section 3 is not sought to be applied and the existing routes which embrace all of the lines of the American Railway Express Company between the several termini involved are not held by the Commission to be unreasonably long."

3. The order made by the Commission in this case is an order which puts it in the power of the Southeastern Express Company and of shippers to short haul the American Company through the Washington gateway. The Commission concedes that as to this traffic the American has its own reasonable route. The order does not condemn any route operated by the American Company.

4. The Commission put its finding in this case fairly and squarely upon the proposition that an

express company was not included in Section 15(4) of the Act, and that, therefore, the Commission had the power to short haul an express company if it thought it desirable or necessary in the public interest to do so.

5. The interlocutory injunction issued in this case does not prevent the Interstate Commerce Commission from finding if the facts warrant it, that the American has violated Section 3 of the Act or any other section of the Act. The interlocutory injunction (R. 121) merely prohibits the Commission from establishing through routes contrary to the provisions of paragraph 4 of Section 15 of the Act.

6. We do not apprehend that either the Commission or any court would hold that the American Company had violated either Section 3 or any other section of the Act, by holding to its own lines the traffic which it had originated itself, as long as it could reasonably do so.

7. Neither the Government, nor the Commission, nor the other Interveners have taken the position in any of their briefs that Section 3 of the Act is involved.

VI.

It is immaterial in this case whether the Uniform Express Contract is or is not a pooling arrangement. That question has no relevancy to this case.

This question is discussed in the brief of the Southeastern, pages 94 to 108.

We have already shown in our main brief that the organization of the American Railway Express Company has been specifically authorized by the Interstate Commerce Commission and that the Commission has had before it the alleged pooling provisions of the contract and under paragraph 1 of Section 5 of the Act the Commission has approved and authorized these provisions of the contract.

1. This contention of the Southeastern Express Company was not noticed by the Commission in either of its opinions rendered in this case. Nor does the Interstate Commerce Commission in its brief filed in this case put forward any such contention. Judge Bryan in his dissenting opinion (R. 132) seems to think the Interstate Commerce Commission has practically "unlimited" power in this matter and his opinon to this effect is induced in part by the alleged pooling arrangement of the Uniform Express Contract. On page 100 of its brief the Southeastern Express Company makes the suggestion that it was, perhaps, fortunate that in view of this case the Commission did not withdraw its approval of the Uniform Express

Contract, and in the next breath and on the same page the Southeastern Express Company says:

> "In other words, the Commission has found a way by which its approval of the contract can legally continue providing through routes and joint rates which it has required in the order already entered and which it may hereafter require to be kept open and made available to the public."

It is rather inconsistent to start out by saying that the American Company was fortunate that the Commission did not use the Uniform Express Contract as a club over the head of the American in this case and then to wind up with the statement that the Commission has found a way through this contract to make an order which it otherwise could not make.

2. In this same connection the Southeastern Express Company in its brief claims that the American Company is "stifling competition" and monopolizing express business and obstructing reasonable competition. There is nothing in the record to justify such contentions. The Southeastern Express Company operates from Washington to Birmingham over the main line of the Southern Railway. The American Company operates from Washington to Birmingham over the Richmond, Fredericksburg & Potomac and Seaboard Air Line Railways. The Southeastern is competing with the American for this business from Washington to Birmingham and intermediate points. If the American has the legal right under the Interstate Commerce Act to haul the traffic which it originates as far as it reasonably can do so, the fact that it avails itself of its rights under the Act cannot fairly

be characterized either as stifling competition or as monopolizing business. In point of fact, the Southeastern Express Company is seeking to short haul the American Company through the Washington gateway on business which the Southeastern Company has neither the trouble nor the expense of originating. It has always been a fundamental principle in the American law of carriers that the carrier which originates traffic has the right to keep the traffic to its own lines as long as it may fairly and reasonably do so without any inconvenience to the public. If it were not for this principle there would be no inducement for a carrier to build expensive terminals and to reach out for and initiate traffic. The Southeastern Express Company is doubtless carrying all of the north bound traffic which it originates through the Washington gateway and thereby getting the long haul on its own lines.

Neither the Government, nor the Commission, nor any other Intervener has taken the position in any of their briefs that the pooling provision of the Act has anything to do with this situation. Of course it has not. In no event would the pooling provision of the Act have been passed upon with no other parties before the Commission than those persons who are here parties. The Commission squarely based its ruling upon other grounds.

VII.

The American offered to make joint rates between all offices of both Companies provided that the originating Company shall have the right to the long haul so far as that can be preserved to it without causing unreasonable delay in the delivery of the traffic to the consignee.

1. This tariff was rejected by the Interstate Commerce Commission (R. 40). This tariff is quoted in the Southeastern's brief at page 132 and at pages 133 to 135. Complaint is made by the Southeastern that this tariff proposed by the American only made rates from common points on north bound traffic and did not provide for rates on south bound traffic. We might answer that the Commission itself has established routes and rates in the same way; see Murray Lighterage & Transportation Co. *v.* D. & H. Co., 25 I. C. C. 388, 391, and Truckers Transfer Co. *v.* Charleston & Western Carolina Ry. Co., 27 I. C. C. 275, 278. But the tariff provided for joint rates from all offices of both Companies. What the Southeastern really means is that as it had no lines north of Washington under this tariff it could not take any business away from the American coming from points north of Washington because the tariff preserved to the originating company the right to the long haul. The Commission rejected the tariff because it preserved to the originating carrier the long haul and the Commission was proceeding on the theory that it had the right to take the long haul away from the originating carrier if it saw fit to do

so and if in the opinion of the Commission it was necessary or desirable to do so in the public interest.

2. The Southeastern complains in its brief especially at page 109 that the American has closed to it the Washington gateway. The Southeastern discusses the case as though the American had been the aggressor in this matter and had taken away from the Southeastern something to which it had legitimate right. The fact is the shoe is on the other foot. On May 1st, 1921, the Southern Railway excluded the American Company from all of its lines and made a contract with the Southeastern Express Company, a rival and competitive company. Thereupon naturally the American Company ceased hauling its traffic from Washington over the lines of the Southern Railway and hauled its traffic over the Richmond, Fredericksburg & Potomac and the Seaboard Air Line Railways with both of which it had contracts. The Southeastern seems to think that because once upon a time the American carried its express traffic over the main lines of the Southern Railway from Washington that it must do so always notwithstanding the Southern Railway has put the American Railway Express Company off its lines and made a contract with another company to operate over its lines.

On May 1st, 1921, as soon as the Southeastern Express Company began to operate it published a tariff the effect of which was to open up all the business originating by the American Railway Express Company to the Southeastern Company. In other words, under this tariff the Southeastern Express Company at Washington and at all other border points would be in a position to short haul the American Company on the traffic originated by it in the territory in which it exclusively operates.

Immediately the American Company did the only thing it could do under the exigencies of the situation and limited its concurrence to traffic moving between exclusive offices of both companies. Subsequently the American Company opened up many joint routes with the Southeastern Company. The American Company holds itself ready at any time to open up any joint routes where it appears it is in the public interest to do so. The only thing for which the American contends is that where it originates traffic it is entitled to hold it to its own lines as long as it can reasonably do so. The Commission has not condemned any of the routes operated by the American in this case. The order relates entirely to traffic originating in New England, New York City and at points along the main line from New York to Washington, and relates exclusively to traffic destined to points on the main line of the Southern Railway between Washington and Birmingham. No other routes and no other traffic is involved in the case. It is idle to discuss other routes and other traffic. The Commission itself said (R. 19):

> "The record abounds in comparisons of express schedules from which it is argued by each company that the specific route used or desired to be used is practical and gives either equal or better service than the other route or routes in question. Nothing can be gained by setting forth all these comparisons."

The only effect of the voluminous references in the brief of the Southeastern Express Company to the various routes which were discussed in the case before the Commission is to muddy the waters. The Commission's order relates to precise and definite traffic and the only question in the case is whether this order is a lawful and valid order.

VIII.

The brief for the United States.

We believe that what we have said in our briefs answers the brief filed by the Solicitor General in behalf of the United States and also the matters covered in the briefs filed by the other appellants, but we desire to refer specifically to the brief of the Solicitor General, wherein he sets forth at great length statutory provisions relative to the use of the words "carrier by railroad". We believe that a complete answer to this argument is, as found by the District Court, that the ordinary acceptation of these words was changed when express companies were brought into the Interstate Commerce Act, and therefore their meaning is to be determined by the "dictionary" of that Act and not by the meaning they may have in other Acts, or outside of the Interstate Commerce Act.

It also must be borne in mind that the Interstate Commerce Act applies only to common carriers engaged in transportation "wholly by railroad, or partly by railroad and partly by water", and that therefore an express company can be subject to that Act only when it is a "carrier by railroad".

IX.

The American Company is not cut off from urging that the order of the Commission was unjust and unreasonable because it did not take a cross Appeal.

Southeastern Express Company contends in its brief, page 179, that the American Company cannot contend that the order of the Commission was arbitrary and unreasonable because the majority of the special court decided this question against the American and that as the American took no cross Appeal it cannot be heard on this question.

It is entirely unnecessary to take any cross Appeal. The appeal brings up the whole case on the law and on the facts. The question before the Supreme Court is whether the interlocutory injunction granted by the District Court is right or wrong. It does not make any difference what may be the reason which moved the District Court to grant the interlocutory injunction if it was right. The American Company can urge any reason or any ground in support of the interlocutory injunction granted by the District Court.

The only case cited by the Southeastern in support of its contention is Peoria & P. U. Ry Co. *v.* the United States, *et al.*, 44 Sup. Ct. Rep. 194. This case, just like the case at bar, was an injunction suit brought against the United States under the Act of October 22, 1913, to set aside an order of the Interstate Commerce Commission. The United States contended that the suit was brought in the wrong jurisdiction and this question was decided against it in the District Court. It took no appeal from this decision to the Supreme Court. When

the cases got to the Supreme Court, the United States there insisted upon its jurisdictional point. The Supreme Court decided that under the Act of October 22, 1913, the question was not one of jurisdiction at all, but was one of venue, and that the question of venue having been decided against the United States in the lower court by not taking an appeal from the decision, it waived the question of venue. The question of venue was an entirely separate and independent question from the merits of the controversy. We were satisfied in this case with the interlocutory injunction granted by the Court, and therefore there was no reason why we should take any cross Appeal. We are entitled to urge in support of the grant of the injunction any good and valid reasons to sustain it.

X.

Conclusion.

We respectfully submit that the decree of the District Court should be affirmed.

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Dated April 5, 1924.